(32,094)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 527

ED TUMEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

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[fols. 1-11] **IN SUPREME COURT OF OHIO**

No. 19611

ED TUMEY, Plaintiff in Error,

vs.

STATE OF OHIO, Defendant in Error

WRIT OF ERROR—Filed June 20, 1926

Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the state of Ohio, before you or some of you, being the highest court of law or equity of said state in which decision could be had in the said suit between Ed Tumey and the State of Ohio, wherein was drawn in question the validity of various statutes of said state and ordinances of the Village of North College Hill and the exercise of jurisdiction by the Mayor's Court of the Village of North College Hill of said State on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto and said decision was in favor of such, its validity, a manifest error hath happened, to the great damage of the said Ed Tumey as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then [fol. 12] under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the Unite States, together with this writ, so that you have the same at Washington on the 27 day of July, 1926, in the said Supreme Court

of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States the 28 day of June, in the year of our Lord, 1926.

Harry F. Rabe, Clerk of the United States District Court for the Southern District of Ohio, Western Division, by T. V. Lamb, Deputy. (Seal.)

Allowed by Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fols. 12½-14] [File endorsement omitted.]

[fol. 15] In Mayor's Court of the Village of North College Hill, Hamilton County, Ohio

No. 599

The State of Ohio, Plaintiff,

vs.

Edward Tumey, Defendant

Stipulation re Certain Facts—Filed in Supreme Court June 29, 1926

It is hereby stipulated by and between counsel for the parties hereto that the testimony given by Harry Zimmerman, one of the witnesses for plaintiff, is corroborated by one Hayes Perkins, who was also called as a witness for the State in the hearing before the Mayor of North College Hill, and it is further stipulated that the contents of Exhibits one, two and three contain more than one-half of one per cent of alcohol, and are fit for beverage purposes.

Harry H. Shafer, Edward P. Moulinier, James L. Magrish, Attorneys for Ed. Tumey. Allen Roudebush, Charles M. Earhart, & Murphy & Joseph, Attorneys for the State of Ohio.

[fols. 15½-19] [File endorsement omitted.]

[fol. 20] IN MAYOR'S COURT OF THE VILLAGE OF NORTH COLLEGE HILL

AFFIDAVIT OF HARRY P. ZIMMERMAN

(Possessing)

STATE OF OHIO,
Hamilton County, ss:

Before me, A. R. Pugh, Mayor of the Village of North College Hill, County of Hamilton, Ohio, personally came Harry P. Zimmerman, who being first duly sworn according to law deposes and says:

That on or about the 23rd day of August A. D. 1924, in the county of Hamilton, State of Ohio, one Edward Tumey did then and there possess intoxicating liquors; that the possessing of intoxicating liquors as aforesaid by the said Edward Tumey was then and there prohibited and unlawful and contrary to Section 6212-15 of the General Code and against the peace and dignity of the State of Ohio.

Further deponent saith not.

(Signed) Harry P. Zimmerman.

Sworn to by Harry P. Zimmerman, and subscribed in my presence this 23rd day of August, A. D. 1924. (Signed) A. R. Pugh, Mayor of the Village of North College Hill, Hamilton County, State of Ohio. (Seal.)

[fol. 21] IN MAYOR'S COURT OF NORTH COLLEGE HILL

JUDGMENT—September 12, 1924

It is therefore on said day, by me, the said Mayor adjudged and ordered that the said defendant Eward Tumey, be and is hereby fined the sum of one hundred dollars, and the costs of this proceeding and stands committed to the Hamilton County Jail until said fines are paid, secured to be paid, or he is otherwise released by process of law, said defendant to be given credit of 60¢ per day for each day served.

Motion for new trial filed on September 13, 1924.
Same was overruled on September 17, 1924.

THE STATE OF OHIO

vs.

EDWARD TUMEY

White Oak

Justice's or Mayor's Fees

Taking and Certify, — Affid., ea. 80	$2 40
Indexing Case, 20	20
Issuing Warrant to Arrest—Persons, 80	80
Issuing Search Warrant, 80	80
[fols. 22 & 24] Swearing—Witnesses, ea. 10	90
Hearing case where evidence is introduced, 2.00	2 00
Pronouncing Judgment, .80	80
Numbering and Filing—Necessary papers, .10	60
Entering fine and costs on cash book, .40	40
Making Trans., incl. Certif. 2.50	2 50
Signing and Certify. Bill of Except., .50	50
Making itemized Cost Bill of Docket, .50	50
Chemist	3 00
Total	$15 40

Constable's or Marshal's Fees

Actual am't paid solely for the transportation, meal, and lodging of prisoners, the moving and storage of goods, and the care of animals taken on any legal process, as specifically itemized on back of the writs and sworn to, as also shown below: $8.00.

Justice's or Mayor's Fees	$15 40
Constable's or Marshal's Fees	8 00
Total	$23 40

[fol. 25] In Mayor's Court of the Village of North College Hill

[Title omitted]

Bill of Exceptions—Filed in Common Pleas Court September 26, 1924; in Court of Appeals July 30, 1925; in Supreme Court February 3, 1926.

Motion to Dismiss and Order Overruling Same

Mr. Shafer: I now wish to file the following motion to dismiss the defendant:

"Now comes the defendant by his counsel and in addition to the motion to dismiss which was heretofore filed and [fol. 26] overruled by the Court, defendant further moves to dismiss defendant for the following reasons:

In this case the Mayor of North College Hill intends to conduct the proceedings against defendant, not by virtue of the powers conferred by the statutes upon the Mayor of a village, which gives him cognizance of ordinary offenses for breach of the peace and other offenses of a similar nature by statute and ordinance, but by virtue of the prohibition laws of the State of Ohio, which purport to give jurisdiction to a Mayor of a municipality in the county in which the municipality exists in state cases, for a violation of liquor laws:

That before jurisdiction of the Mayor of North College Hill began to be exercises in State cases under the prohibition laws, it was suggested to the solicitor, and the then Mayor and the village council, by some one unknown to defendant, that by acting as a liquor court in said villa*be*, great sums of money could be obtained for the benefit of the Village of North College Hill, for the Mayor, for the solicitor of the village and for employes to be used as detectives, constables, deputy marshals, or other employes working out of this court;

That pursuant to said suggestions, certain ordinances and resolutions were passed by the Village of North College Hill, which in substance provide that detectives, secret-service offic*i*ers, operators and inspectors shall receive, as

compensation for their services in securing evidence necessary to secure conviction of persons violating laws of Ohio prohibiting the liquor traffic, an amount of money equal to 15 persent of the village's portion of fines collected; that [fol. 27] deputy marshals of said village, for similar services, should receive 15 percent of the village's portion of the fines collected; that the attorneys prosecuting persons charged with the violating said laws, should receive 10 percent of the village's portion of the fines collected; the Mayor was to receive his fees out of costs collected from persons convicted in trials before him; the compensation of all of above persons entirely dependent upon conviction and collection of fines;

That one of the principal and controlling purposes *pf* providing above machinery to cooperate with the Mayor in securing and trying cases in said Mayor's court in accordance with the ordinances, was to create a commercial business, primarily to greatly benefit, in a monetary way, the village of North College Hill, the Mayor, the solicitors, deputy marshals, spies, in-formers, and other persons leading aid or assistance to said business;

That the machinery provided by the ordinances and resolutions of the village went into operation and large sums of money from collected fines were paid into the village treasury; from the period from May 11, 1923, to December 31, 1923, the amount of fines collected from liquor cases was $20,000.00; during said period the Mayor received the sum of $696.35; that the Treasurer of the State of Ohio received from this amount the sum of $8,992.50¢ that the North College Hill Treasury received $4,471.25; that of this sum $— was placed to the credit of the village safety fund, the amount of $2,697.75 was placed in the Secret Service fund; that of this secret service fund Earl Roehn acting as prosecutor in the liquor court, received [fol. 28] $1,798.50, the deputy marshals, state card-men, operators, inspectors and other employes received $2,697.75; that other large sums approximately $438.50, were paid for costs in transporting prisoners, serving writs, and other services and purposes in connection with the trial of liquor cases;

That since December 31, 1923 up to the present time, large sums have been collected from defendants in liquor

cases, and distributed approximately in the same proportions as occurred prior to December 31, 1923;

That the Village of North College Hill, from its share of the fines collected in liquor cases, has expended large sums of money in public improvements, such as paying salaries of officers and street repair *ect.*, amounting to over $—; and will continue to expend money received from said source in other public imp*o*rvements;

That the Mayor, both as mayor and private citizen and as the head and directing power of the court and the executive head of the municipality, i*n* substantially and pecu*m*iarly interested in keeping together the force of detectives, secret service officers, operators, inspectors, deputy marshals and attorneys and seeing that he and they receive costs and percentages of amounts paid by persons convicted in said court of violations of the prohibition laws;

That said Mayor is an owner of real estate situated in said village of North College Hill, and the amounts paid out by said village from fines collected from liquor cases in public improvements directly enhance the value of the real estate of said Mayor and tend to reduce the taxes paid [fol. 29] on real estate by said Mayor, thereby giving him a direct monetary interest in imposing fines on defendants:

That said Mayor, by reason of the circumstances surrounding him and influence and bias that naturally would result in his mind from the interest he has in convicting defendants in his court, is in law incompetent legally to try said cases before him;

That the system which has been in operation for more than two years and is now in operation in the village of North College Hill, is contrary to the Fourteenth Amendment to the Constitution of the United States, which guarantees to American citizens residing in states that they should only be deprived of their liberties and property by due process of law; that section 16 of Article 1 of the Constitution of Ohio provides that all courts shall be open and the citizen shall have justice administered to him;

That these constitutional guarantees and the fundamental laws of the land contemplate that any court of law shall be impartial; That the judge sitting in such courts shall not directly or indirectly be interested in a monetary way in the result of trials conducted before him; that the

foundation of all constitutions in a civilized society is the administration of justice in a fair and impar-ial manner, and that when courts, authorized by statute or in the business of conducting such courts, operate a system of administration in which the judge, the person acting as prosecuting attorney, the so-called deputy marshals, employes of every kind, by whatever name designated, and the town or village in which they reside or operate, are directly or indirectly interested in a large monetary way in the con- [fol. 30] viction of defendants, such courts are illegal, un-American, contrary to public policy, and destructive of the inalienable rights of individuals, whether as citizens of the state in which they reside or as citizens of the United States;

That the commercial system above described inevitably leads to abuses that are shocking to the minds of patriotic citizens; that those connected with such courts are interested in making unlawful searches and seizures because of their monetary interest in the result; that under the laws of Ohio a private residence cannot be searched unless the affidavits and warrant state that such residence is not a private dwelling and liquor is sold in the places to be searched; that false affidavits have been made and inevitably will be made to search private residences without legal right or authority;

That the use of the process of search and seizure and their accompaniments of spies and paid informers, was one of the complaints against British rule in colonial days, and was one of the moving causes of the American Revolution; that these practices are peculiarly abhorent to the proud and free American citizens, and no system of courts and so-called justice which inevitable produces these evils will be tolerated by a justly aroused and indignant citizenry;

That deputy marshals and other employes of said court are tempted to use violence in making searches and seizures, and that in turn will tend to create violence on the part of the citizen in defense of the sanctity of his home; that said system inevitably produces extortion and blackmail; that however the mayor and solicitor may seek to control the deputy marshals and others working out of the court, they have no way to prevent the unlawful and dan-

gerous acts of deputy marshals, and other employes who operate from such courts;

[fols. 31-38] That it is inevitable in seeking business for said court in order to make money, the deputy marshals and other employes will offer rewards to spies and informers and charges will be made against American citizens and their homes searched by information received from persons who are actuated by malice, revenge or the greed for money.

That from all the facts above stated and from the inferences and conclusions to be drawn from said facts, defendant again protests and objects to being put on trial before this court, and objects to any action being taken by this court, and further again asks that he be dismissed without being put to the expense and trouble of further unlawful proceedings."

The Court: Motion overruled.

Mr. Shafer: Exception.

[fol. 39] A. H. HOFFMANN, a witness called upon behalf of the defendant, having been first duly sworn, testified:

[fol. 40] Direct examination.

By Mr. Shafer:

Q. What is your full name, Mr. Hoffman?

A. A. H. Hoffmann.

Q. Where do you live?

A. 6507 Hamilton Avenue.

Q. Are you a resident of North College Hill?

A. I am.

Q. Do you know Mayor Pugh, Mayor A. R. Pugh?

A. Yes, sir, I do.

Q. He is sitting as a liquor court at the Village of North College Hill, is he not?

A. Yes, sir.

Q. Did you ever hear him make any statements at any time, telling us the place and the time, about the liquor court being created for the purpose of financing the village?

A. I can, I did.

Q. Will you please tell us what those statements were?

A. The night of his appointment I believe in the community house, I cannot tell you the date, to get that I would have to look up the records on that.

Q. That is all right; just tell us what you know about that?

A. Mr. Pugh made the statement that—it wasn't on that night—I handed in the petition for the abolishing, I think that was the night, and he made the statement—I handed in a petition for the abolishing of the village liquor ordinance—yes, that was the night he made the statement that if the finance*w* of the village warranted the liquor court he was going to hold a liquor court, and if the finances of the village did not warrant a liquor court he wasn't going to have a liquor court.

Q. In other words, he said he was creating the liquor court for the purpose of financing the village?

[fol. 41] A. That was it; I suppose that was his intentions.

Q. Were you a member of council at that time?

A. No, sir, just a citizen of the village, that is all.

Q. You -as a citizen of the village, that is all?

A. Yes, sir.

Q. You are opposed to the liquor court are you Mr. Hoffmann?

A. Absolutely; not the fundamental laws, but the way they enforce the law.

Mr. Roudebush: I object to his giving his reasons.

Mr. Shafer: I want to get this into the record.

A. Allen has heard so much of that I suppose he objects to it.

Mr. Roudebush: All right, I will let you go on if you want to make a speech.

A. He has heard so much of it I suppose he is full of it.

Mr. Shafer: Go ahead Mr. Hoffman.

A. I object to the enforcement of the liquor law; I am not opposed to the liquor ordinance, or the liquor law; I voted for the 18th Amendment, but to the methods that are employed in enforcing it.

Mr. Shafer: That is all.

Cross-examination:

By Mr. Roudebush:

Q. You say Mr. Hoffman, that Mr. Pugh created a liquor court that night?

A. No, sir; I did not, Mr. Roudebush.

Q. I thought you said that?

A. No, sir, I says that he would.

[fol. 42] Q. Why there was a liquor court already created, was there not?

A. Yes, sir; there was.

Q. Which was conducted under Mayor Vogelpohl?

A. Yes, sir.

Q. During his term?

A. Yes, sir.

Q. You presented a petition that night to abolish it, did you?

A. To abolish the ordinance.

Q. Yes?

A. Yes, sir.

Q. And that ordinance was in effect not only during the term of Mayor Pugh, but also during the term of Mayor Vogelpohl?

A. Yes, sir; the ordinance was in effect.

Q. It was not created then that night; it had already been created before, a year before?

A. Yes; it was a year before.

Q. Why did you withdraw that petition that you had filed that night when they started to examine the signatures?

A. Why did I what?

Q. Why did you withdraw the petition.

A. Why did I?

Q. Yes?

A. I object to that there question, to answer that question, that is my own affairs why I withdrew it.

Q. You filed the petition?

A. It was my own reasons Mr. Roudebush.

Q. Were all those signatures legitimate?

A. Absolutely; sworn to.

Q. They were sworn to?

A. Yes, sir.

Q. Who swore to that?

Mr. Shafer: I object; just a minute.

Mr. Roudebush: He is objecting to the question as to [fol. 43] who swore to them. What is your objection.

Mr. Shafer: We are not trying a perjury case; it is not a question of who swore to them.

The Court: The objection is sustained.

Mr. Roudebush: I think that is all.

Witness excused.

Lawrence Gerrez, a witness called upon — behalf of the defendant, having been first duly sworn, testified:

Direct examination.

By Mr. Shafer:

Q. What is your name?

A. Lawrence Gerrez.

Q. Where do you live?

A. 1822 Goodman; North College Hill.

Q. Are you a citizen of North College Hill?

A. I am.

Q. I want to ask you if you ever heard Mayor A. R. Pugh make any statements with reference to the liquor court being run for the purpose of financing the village of North College Hill?

A. I did.

Q. Will you please tell us what those statements were, and when they were made?

A. Well I might just as well say when that started otherwise Mr. Roudebush might jump me.

Q. Don't you care for Mr. Roudebush.

A. All right; he knows me too.

[fol. 44] Q. Go ahead.

A. Mr. Hoffman presented a petition of eighty per cent of the citizens of North College Hill against the ordinance of the liquor court, so Mr. Pugh then he decided to accept the petition, and he held a talk on it, and he said if the village didn't need any money he is against it and if the village finances needs it he will run it.

Q. How was the village financially at this time?
A. Broke all the time.
Q. And that is the reason why they ran the liquor court at this time, is that right?
A. Well I couldn't tell you that; because they are broke that is his statement; Mr. Pugh made that statement, if they need it I will have it, if not I am against it.
Q. There isn't any other way of getting money at North College Hill, except by the liquor court?
A. Maybe they cut our weeds.
Q. They cut your weeds?
A. Yes, sir.
Q. I say there isn't any other revenue at this time?
A. Not that I know of.

Cross-examination.

By Mr. Roudebush:

Q. You swear that the Mayor made that statement that night, do you?
A. I do.

Mr. Shafer: It all came out in the newspaper; Brad wrote it.
Mr. Roudebush: Put Brad on the stand to see if he heard any such statement.

Q. So you say that the only way for the Village of North College Hill to get any money is to cut weeds, is that it?
[fol. 45] A. And get some labor out.
Q. Do you know anything about the financial condition of the village?
A. I do.
Q. What do you know about it?
A. I know we ain't got no money.
Q. Are you one of the officers?
A. No, sir; you asked me.
Q. How much money have they got in the different funds if you know all about it; how much money is in the general fund, for instance?
A. I didn't listen to all them, I couldn't tell that.
Q. How much is in the safety fund?
A. I don't know nothing about that.

Q. You don't know anything about that?
A. But I can get it for you.

Mr. Roudebush: That is all.

Redirect examination.

By Mr. Shafer:

Q. Did Mayor Pugh tell the other people there that there wasn't any money in the funds; didn't he make a statement to that effect?
A. Mr. Pugh said, he glanced through his statements, they were just having a financial report then, and he said that there was nothing there.
Q. He said that did he?

Mr. Roudebush: I object to the leading questions.
Mr. Shafer: It is already in.
Mr. Roudebush: He hasn't answered it yet.
Mr. Roudebush: I will withdraw the objection and let him answer.

[fol. 46] A. What was the question.

(Question read.)

A. I know he made the statement, he made a certain remark about that, I couldn't recall exactly how he pronounced that; I wouldn't answer anything like that.

Mr. Shafer:

Q. I don't want you to tell us anything that is not true.
A. I couldn't answer just exactly how he meant it, how he said it.
Q. Did he have any financial statement at the time this petition was handed in which was withdrawn by Mr. Hoffmann?
A. Why if I am right Mr. Markus handed it in that night.
Q. Mr. Pugh didn't have a statement in his hand as you said a minute ago, did he?
A. He didn't have it in his hand, but that is the one that Mr. Markus had, Mr. Markus had his financial report.
Q. That is Mr. Markus had it?
A. Yes, he examined the village books at that time.

Q. The books of account?
A. Yes, sir.

Mr. Roudebush: I think that is all.

Redirect examination.

By Mr. Shafer:

Q. That statement showed nothing in the village funds, did it?

Mr. Roudebush: How would he know that.

Mr. Shafer:

Q. What did Markus' statement show; did you see that statement?
A. Mr. Markus had some statement, I ain't no attorney [fol. 47] to keep them figures all in my head.

Recross-examination.

By Mr. Roudebush:

Q. You didn't know anything about Mr. Markus' report, do you?
A. I think very few knows: I don't think you know all, either.
Q. Answer the question; you are talking about the Markus report, what it was; now what did it show, if you know?
A. I just said in some accounts nothing.
Q. What accounts were those?
A. I cannot recall them all.
Q. What accounts showed that it had some in; what did the general account show?
A. I cannot recall it.
Q. You don't know anything about the Markus report, do you?
A. I know he examined it.
Q. All you know is that a man named Markus handed in some report there?
A. I know the man personally.
Q. Yes; and you know this court was in existence before this was it not?
A. I do.

Q. For over a year?
A. I do.

Mr. Roudebush: That is all.

Mr. Shafer:

Q. Who has this report?
A. I think the village got it now.
Q. The Mayor?
A. Yes.
[fol. 48] Q. The Mayor has this report?
A. The Council maybe has it; he turned it over.

Mr. Shafer: Have you that report, Mr. Pugh?
The Court: No, sir.
Mr. Shafer: Have you seen it?
The Court: I saw it.
Mr. Roudebush: It wasn't any report; it was just getting the different funds in shape and correcting the books, the books were mixed up, and at that time they straightened them out to show what was in each fund.
Mr. Shafer: That is all.

Witness excused.

[fol. 49] HARRY ZIMMERMAN, a witness called upon behalf of the plaintiff, having been first duly sworn, testified:

Direct examination:

By Mr. Roudebush:

Q. What is your name?
A. Harry Zimmerman.
Q. What is your position with the Village of North College Hill?
A. Deputy Marshal.
Q. Do you know Mr. Ed. Tumey?
A. Yes, sir.
Q. Where did you become acquainted with him?
A. On the night he was up here for a hearing.

Mr. Shafer: I object to that.

Mr. Roudebush:

Q. What night was that, if you know?
A. It was a couple of nights after we had conducted a raid at his home.
Q. You say you conducted a raid at his home?
A. Yes, sir.
Q. Did you have a search warrant for that?
A. Yes, sir.

Mr. Shafer: I object to that; don't lead the witness.

Mr. Roudebush:

Q. Just tell us what you did on the night that you made this search that you speak of?
A. Why we went to Mr. Tumey's residence.
Q. Who are "we"?
A. Two other deputy marshals; Mr. Perkins, Mr. Keller, the three of them, or rather I will change that, Mr. Hann was with us.
Q. What did you?
[fol. 50] A. Mrs. Tumey was there at home and——
Mr. Shafter: I object.
Mr. Roudebush: What is your ground?
Mr. Shafer: Mrs. Tumey is not being prosecuted here; let him tell what he found.
Mr. Roudebush: He can tell what he found: he found her in the house.
Mr. Shafter: Let him tell what he found?

A. I found approximately fifty gallons of wine and a bottle partially filled with moonshine.

Mr. Roudebush:

Q. Where did you find that?
A. In the cellar.
Q. What did you do after that?
A. Took samples of the wine, and took the moonshine and I am not a chemist myself, but we took samples of the wine and the moonshine, and we labelled it and held it as evidence, held it for the Mayor's court for disposition of the case.

Q. What did you do with the samples you took?
A. Took them to Mr. Simonson, the Chemist on 9th Street.
Q. Were these bottle marked?
A. Yes, sir.
Q. Where are these samples now?
A. In the room there.
Q. Will you bring them out?
A. I can.

(Witness produces four bottles marked exhibits 1, 2, 3 and 4 for identification.)

Q. Take the sample marked exhibit 1 for identification and tell us whether you can identify that bottle?
A. I can identify that bottle.
Q. Where did you see that bottle for the first time.
A. I got that in Mr. Tumey's cellar.
[fol. 51] Q. What was in it at the time?
A. It was empty at the time; we took a sample out of the cask and put it in the bottle and brought it along as a sample.
Q. What is that other bottle there?

Mr. Shafter: Just a minute do you know what the other bottle is there?
A. This bottle (indicating)?

Mr. Roudebush:

Q. Yes; can you identify that?

Mr. Shafter:

Q. Were you there when they changed that?
A. This bottle here (indicating) was one that was in the chemist's office.
Q. Did you see it?
A. I heard about it.

Mr. Roudebush: I will withdraw that.

Q. Now take exhibit No. 2 for identification, I will ask you if you can identify that?
A. I can.
Q. What is it?

A. This bottle I got out of Mr. Tumey's cellar.

Q. What did you do with it?

A. We brought it in; it had a sample in it that was analyzed by Mr. Simonson.

Q. Can you identify that bottle exhibit No. 3 for identification?

A. Yes, sir.

Q. What is that?

A. That is another bottle that we got from Mr. Tumey's cellar and brought it in; we took a sample from the cask and put it in there and we brought in the sample.

Q. Now examine exhibit for identification No. 4; can you identify that?

A. I can.

Q. What is that?

[fol. 52] A. That is a bottle that was wrapped up in a small keg sitting under the work bench in Mr. Tumey's cellar.

Q. Where does Mr. Tumey live, where is his house, in what County?

A. Hamilton County, Ohio.

Q. And what did you do with that?

A. We brought it in and turned it over to the Mayor.

Q. Did you take a sample of that?

A. No, sir.

Q. Did you see Mr. Tumey out there that day?

A. No, sir.

Q. You didn't have any conversation with him?

A. No, sir.

Q. Who was with you?

A. Mr. Rann, Mr. Keller and Mr. Perkins.

Q. Are they also deputy marshals of North College Hill?

A. Yes, sir.

Q. Did you taste any of this liquor?

A. No, sir.

Mr. Shafter: I object.

Mr. Roudebush: You object to whether he tasted it or not?

The Court: The objection is sustained.

Mr. Roudebush: Well, he said he didn't anyhow. That is all.

[fol. 53] Cross-examination.

By Mr. Shafer:

Q. How long have you been a liquor agent?

A. Oh, about eight weeks, I guess.

Q. What did you do before you were a liquor agent?

A. Why I worked in the city, New York City.

Q. You worked in the city?

A. Yes, sir, New York.

Q. How long have you been in Cincinnati?

A. I was here about seventeen years previous to coming back from New York.

Q. How long has it been since you came back from New York?

A. About ten weeks.

Q. What did you do in New York?

A. I worked for the Brooklyn Edison Company.

Q. How long did you work for them?

A. About eight months.

Q. How did you come to get on the prohibition squad?

A. Mr. Pugh, the Mayor here, I was here talking to him one day and at the time I was working in Montgomery, out of the Court there, and I was talking to the Mayor here one day and he asked me if I would care to come here and work for him and I told him I would.

Q. You worked in the Montgomery Liquor Court for about how long?

A. About a week.

Q. How did you come to get your job out there?

A. Through the Anti-saloon League in Cincinnati.

Q. Are you a prohibition worker, that is, you are a part of the prohibition forces, are you?

A. Of North College Hill Court I am, yes, sir.

[fol. 54] Q. But not otherwise?

A. How do you mean, not otherwise?

Q. I mean you don't work in the anti-saloon League, is that what you say?

A. I don't make it a business, but I help them if I can; if I get the opportunity.

Q. You make it a business of being a prohibition officer?

A. Yes, sir.

Q. What salary do you get as a prohibition officer?
A. Fifteen per cent.
Q. Fifteen per cent of what?
A. Of the fines from this village.
Q. You get no other revenue at all?
A. Not from the Village of North College Hill.
Q. And you won't get any revenue unless there is a fine assessed in this case.
A. Not from the village.
Q. How often have you been in trouble?
A. I haven't been in trouble at all.
Q. Have you ever been arrested before?
A. No, sir.

Mr. Roudebush: I object.
The Court: Wait a minute.
Mr. Shafer: He has answered it.
Mr. Roudebush: You said "before."

Mr. Shafer:

Q. Have you ever been arrested for the forgery of a search warrant in any Court?
A. No, sir; not that I know of.
Q. You have not been in any trouble at all?
A. Not that I know of.
[fol. 55] Q. Are you certain about that?
A. Yes, sir.
Q. There isn't any question about that?
A. No, sir.
Q. You have never been arrested before?

Mr. Roudebush: I object to "before," your Honor; he has never said he has been arrested.

Mr. Shafer:

Q. You have never been convicted before?

Mr. Roudebush: I object to that.

Mr. Shafer:

Q. Now this day when you went out to this house the four of you men went into the house where a lone woman was, is that right?

A. We did.

Q. You made a raid there and you went in and confiscated four bottles?

A. Yes sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. Do you know Wang, Bill Wang?

A. I have seen him.

Q. You were there at his house too on that day were you not?

A. William Wang?

Q. Yes; you went over to his house on that day didn't you?

A. Yes, sir.

Q. He is a son-in-law of Ed. Tumey is he not?

A. I don't know.

Q. You don't know that?

A. No, sir.

Q. Where did you get your information for these raids?

Mr. Roudebush: I object.

[fol. 56] Mr. Shafer: That is entirely proper; he has got to tell the information.

Mr. Roudebush: He don't have to tell it; I object to that question.

Mr. Shafer:

Q. Where did you get your information for these raids?

Mr. Roudebush: I object.

The Court: I will sustain the objection.

Mr. Shafer: Exception. I want to put it into the record that the prohibition officers from the court advertises in the newspapers for the purpose of getting information to make liquor raids.

Q. How did you come to go to these two houses on that day?

A. I had information that there was violations of the law there.

Q. You had information of the violation of the law there were those informations which you got by Letter or parol?

Mr. Roudebush: I object.

Mr. Shafer: He has already said that he had information; let's see what it is.

Mr. Roudebush: He doesn't have to give it. The Court has already ruled on that.

The Court: I will sustain the objection.

Mr. Shafer: Exception.

Q. Who else was with you in this trip?

A. Mr. Perkins.

Q. Mr. Perkins, and who else?

A. Mr. Keller.

Q. Mr. Keller?

A. Yes, sir; and Mr. Rann.

Q. Mr. Rann and who else?

A. And myself.

Q. That is all, just the four of you?

A. Yes sir.

Q. And all you found was fifty gallons of wine, is that right?

[fol. 57] A. I would judge about that; it was in different containers.

Q. What kind of wine was that?

A. Well I don't know myself only except that Mrs. Tumey told me, if I remember right, she said there was some blackberry, and some red raspberry and some cherry.

Q. Have you got all of those samples here?

A. Yes, sir; these are the samples.

Q. Why did you ask whether he owned his house?

A. I didn't ask him whether he owned his house.

Q. Did you ask him whether he had a mortgage on the house?

A. No, I did not.

Q. Who asked him that?

A. I don't know; I didn't hear it asked.

Q. Did anybody ask his wife those things?

A. Not that I heard.

Q. Not that you heard?

A. No, sir.

Q. You never heard anything like that?

A. No, sir.

Q. Were you together with the other one all the time?

A. We were in the cellar at the same time.

Q. You were all in the cellar?

A. Yes, sir.

Q. Did you go right into the house and find this stuff right off the reel?

A. Well, we went into the house and Mrs. Tumey told us that they had wine down the cellar, and she led the way down there and we went down there and found it.

Q. What else did you find besides wine?

A. That bottle there containing what I would term moonshine; that exhibit 4 there.

Q. You don't know what is in the bottle?

A. No, sir, I don't know, it would be whiskey or moonshine; it is intoxicating liquor.

[fol. 58] Q. How do you know it is intoxicating?

A. How?

Q. How do you know it is intoxicating?

A. I am not a chemist.

Q. Did you drink any of it?

A. No, sir.

Q. You don't know whether it is intoxicating or not, now, do you?

A. No, sir; I cannot swear that it is intoxicating.

Q. Then when you say it is intoxicating you don't mean that, do you?

A. No answer.

Q. I say do you want the court to understand that this exhibit 4 is moonshine?

A. That is what I would call it.

Q. That is what you would call it?

A. Yes, sir.

Q. From what you can see?

A. From what I can see.

Q. Where did you get that bottle?

A. In Mr. Tumey's cellar.

Q. Where at in his cellar?

A. In a little keg under a rough bench there; he had a lot of paint cans and so forth sitting on it.

Q. You found it in the little bench in the cellar is that right?

A. Under the bench, in a keg.

Q. In the keg?
A. Yes, sir.
Q. You mean that this liquor was in the keg?
A. Yes, sir.
Q. Or in the bottle?
A. The liquor was in the bottle and the bottle was in the keg.
Q. The bottle was in the keg?
A. Yes, sir.
Q. And that was how far away from the wine?
A. It was across Mr. Tumey's cellar; I judge about nearly fifteen or twenty feet.
[fols. 59-65] Q. And you won't get any salary if you don't win this case, will you?
A. Not from the village.
Q. You won't get any salary at all, will you?
A. I object to answering that; that is my own personal affairs. I answered not from the village.

Mr. Roudebush: I guess that is what he wants to know, whether you get anything from the village.
Mr. Shafer: I am asking him if he gets any salary.

Q. Do you get any salary?
A. Not from the village.
Q. Will you get any salary out of this case at all for this work you are doing?
A. Not out of this case.
Q. Well, that is all I want to know;
A. No, sir.

Mr. Shafer: That is all.

Witness excused.

[fol. 66] IN MAYOR'S COURT OF NORTH COLLEGE HILL

EXHIBIT "A" IN EVIDENCE

(Copy)

ORDINANCE #125

An ordinance to provide for compensation to be paid from the Secret Service Fund of the village of North College Hill, Hamilton County, Ohio, created by authority of Section 7212-37 of the General Code of Ohio, to detectives, secret service officers, deputy marshals, and attorney's fees, costs, etc., for services in securing evidence necessary to conviction and prosecuting violations of the law of the State of Ohio prohibiting the liquor traffic.

Be it ordained by the Council of the Village of North College Hill, Hamilton County, State of Ohio:

Section 1. That fifty per cent of all moneys hereafter paid into the treasury of said Village of North College Hill, Ohio, that is one half of the share of all fines collected and paid into and belonging to said Village of North College Hill, Ohio, received from fines collected under any law of the State of Ohio prohibiting the liquor traffic, shall constitute a separate fund to be called the Secret Service Fund to be used for the purpose of securing the enforcement of any Prohibition Law.

Section 2. That Deputy Marshals of the Village of North College Hill, Ohio, shall receive as compensation for their services in securing the evidence necessary to secure the conviction of persons violating the Law of the State of Ohio, prohibiting the Liquor Traffic, an amount of money [fol. 67] equal to 15% of the fine collected, and other fees allowed by law.

Section 3. That the Attorney at Law of record prosecuting persons charged with violating the law of the State of Ohio prohibiting the liquor traffic shall receive as compensation for legal services an amount of money equal to 10% of the fine collected, in all cases, whether plea be guilty or not guilty.

Section 4. That detectives and secret service officers shall receive as compensation for their services in securing the evidence necessary to secure the conviction of persons violating the Law of the State of Ohio prohibiting the liquor traffic, an amount of money equal to 15% of the fine collected.

Section 5. That the Mayor of the Village of North College Hill, Ohio, shall receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases.

Section 6. This ordinance is hereby declared to be an emergency ordinance, necessary to the immediate preservation of th public peace and safety, made necessary by reason of the flagrant violation of the Laws of Ohio, enacted to prohibit traffic in intoxicating liquors, and shall be in effect from and after its passage.

Passed and adopted by Council this 11th day of May, 1923.

(Signed) Charles M. Bourgeois, Mayor. A. R. Pugh, Mayor.

Attest: Perry C. Brestel, Clerk. George Munday, Clerk.

[fol. 68] In Mayor's Court of the Village of North College Hill

[Title omitted]

Judgment

The Court: There is no question but what there was wine there having an alcoholic content above what the law permits; the evidence shows that there was about thirty five gallons of that wine, the alcoholic contents of it was in violation of the statute 6212-15 of the General Code.

I therefore find the defendant to be guilty and assess a fine of one hundred dollars and the costs in the case, and he will stand committed to the Hamilton County Jail until said fine and costs are paid or secured, or otherwise he be released by proper process of law.

Mr. Shafer: We note an exception to the ruling.

Mr. Roudebush: And that he be credited with sixty cents a day if he should go to jail on the fine.

The Court: Yes; that is the law.

Mr. Shafer: Exception to the ruling.

Wm. F. Copeland, Shorthand Reporter.

[fol. 69] In Court of Appeals, First Appellate District of Ohio

No. 2748

State of Ohio, Plaintiff in Error,

vs.

Ed. Tumey, Defendant in Error

Judgment—January 11, 1926

This cause coming on to be heard upon the petition in error transcript, bill of exceptions, the original papers and pleadings, and was argued by counsel; upon consideration whereof the Court finds that there is error prejudicial to the plaintiff in error upon the record in said proceedings and judgment, in this, that the Court of Common Pleas erred in reversing the judgment of the Mayor's Court.

The Court further finds that defendant in error claimed that the Mayor exercised jurisdiction in this case in violation of Section 1 of the 14th Amendment of the Constitution of the United States and of Section 16, Article 1 of the Constitution of the State of Ohio, but that said claim was not well taken and that the judgment of the Mayor should have been affirmed by the Court of Common Pleas.

It is therefore considered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, for the defendant in error be and the same is hereby set aside and the judgment of the Mayor's Court is hereby affirmed, and further *and* the plaintiff in error recover from the defendant in error its costs herein expended, taxed at $—.

It is further ordered that a special mandate be sent to Court of Common Pleas of Hamilton County, directing

said Court to affirm the judgment of the Mayor's Court, and that a special mandate be sent by said Common Pleas [fol. 70] Court to said Mayor's Court affirming said judgment.

To all of which counsel for defendant in error excepts.

[fol. 71] IN SUPREME COURT OF OHIO

No. 19611

ED TUMEY, Plaintiff in Error,

vs.

STATE OF OHIO, Defendant in Error

PETITION

Plaintiff in error says that defendant in error, by consideration of the Court of Appeals of the First Appellate District, Cincinnati, Ohio, on the 11th day of January, 1926, at the January term of said court, recovered a judgment and final order against the plaintiff in error in a certain proceeding numbered 2748, pending therein, wherein said plaintiff in error herein was defendant in error, and defendant in error herein was plaintiff in error, by which said judgment and final order said Court of Appeals reversed a certain judgment and final order of the Court of Common Pleas of Hamilton County, Ohio, theretofore rendered against the defendant in error, and which itself reversed a certain judgment and final order of the Mayor's Court of the Village of North College Hill, Hamilton County, Ohio, theretofore rendered against this plaintiff in error; a transcript of the docket and journal entries whereof in full in said Court, together with all the original papers and pleadings therein, including a bill of exceptions, are hereto attached and filed herewith.

Plaintiff in error says that there is error in said judgment, final order, records and proceedings, in this, to-wit:

1. In reversing the judgment and final order of the said Court of Common Pleas and in refusing to affirm the same.

2. In failing to hold that the said Mayor's Court of the [fol. 72] Village of North College Hill erred in the following respects:

(a) In overruling the motion of defendant in the Mayor's Court to disqualify himself as a judge in said cause.

(b) In overruling the demurrer of the defendant in the Mayor's Court on the ground that the Mayor was disqualified in acting in said cause.

(c) In not sustaining the motion of the defendant in the Mayor's Court for a new trial, and in overruling said motion for a new trial, for the reason stated in said motion.

(d) In rendering judgment in favor of the State of Ohio and refusing to render judgment in favor of the defendant in the Mayor's Court.

3. In holding that Section 6212-37 of the General Code of Ohio and Ordinance No. 125 of the Village of North College Hill were not violative of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 16, Article 1 of the Constitution of the State of Ohio, in that said section of the Ohio Code and the ordinance of the Village of North College Hill provided for a commercial liquor court in which the Mayor as Judge was interested to such an extent as to be disqualified because of the commercial character of said Court; said provision of the Federal and State Constitution guaranteed to the citizen an impartial court, and said court so organized was not impartial but was interested in the outcome of the suit.

4. In holding that Mayor Pugh, or North College Hill, was not disqualified under said Federal and State constitutional provisions because he had stated, before serving as a Judge in said liquor court, that he would carry on the court for the purpose of financing the village, which village at said time was in a bad financial condition.

5. In holding that the conviction of the defendant in the Mayor's Court was not repugnant to or violative of any of the provisions of the Federal Constitution and of the Ohio Constitution.

[fols. 73-75] 6. In giving judgment for the defendant in error when it should have been given for the plaintiff in error.

Wherefore plaintiff in error prays that the finding, judgment and orders of the Mayor's Court and of the Appellate Court be reversed, and that he may be restored to all things he has lost by reason thereof.

Heary H. Shafer, Edward P. Moulinier, Attorneys for Plaintiff in Error.

[fols. 76-78] In Supreme Court of Ohio

[Title omitted]

Journal Entry of Order Overruling Motion for Order to Certify Record

May 4, 1926. Motion for an order directing the Court of Appeals of Hamilton County to certify its record. It is ordered by the Court that this motion be, and the same hereby is, overruled.

Journal 30, page 522.

In Supreme Court of Ohio

Journal Entry of Judgment

May 11, 1926.—Error to the Court of Appeals of Hamilton County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, upon the motion of defendant in error to dismiss the petition in error, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said petition in error be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—.

Ordered, That a special mandate be sent the Court of Common Pleas of Hamilton County, to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County, "for entry."

Journal 30, page 527.

[fols. 79-114] In Supreme Court of Ohio

[Title omitted]

Judgment—May 11, 1926

It is ordered and adjudged that said petition in error be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

Petition in error dismissed.

Marshall, C. J., Jones, Matthias, Day, Allen and Kinkade, JJ., concur.

[fol. 115] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Plaintiff in Error of Parts of the Record to be Printed, With Proof of Service—Filed August 7, 1926

Plaintiff in error, Ed Tumey, was convicted in the Mayor's Court of North College Hill, Hamilton County, Ohio, and fined for possession of wine in violation of a statute of Ohio. Tumey objected to going to trial on the ground that the Mayor was disqualified because of financial interest in the prosecution, and a trial before him would be in violation of the defendant's rights under the Fourteenth Amendment to the Federal Constitution. He was convicted, but this was set aside on constitutional grounds by the Common Pleas Court in a long and able opinion. The Court of Appeals and State Supreme Court sustained the conviction, but neither courts discussed or decided the points raised by Tumey. Following are the points raised by the record and upon which plaintiff in error relies.

1. A conviction of a defendant by a mayor of a village in Ohio, who is personally financially interested in such

conviction is a denial of due process of law in violation of the Fourteenth Amendment.

2. Such a mayor is also interested in a prosecution where as executive head of the village, the village itself and the deputy marshals and secret-service agents who worked up [fol. 116] the case (and owe their appointment to the mayor) receive pay only if fines are imposed upon and collected from defendants.

3. Where a mayor upon his election to office states that he will carry on a liquor court to make money for his village, he is disqualified and a prosecution before him is an unfair trial which deprives the convicted defendant of liberty and property without due process of law, in violation of the 14th Amendment.

4. Where a mayor carries on a liquor court as a commercial enterprise to make money for himself, the village and the officers of the court, there is a denial of due process in violation of the 14th Amendment to a defendant convicted by such a mayor.

5. Section 6212-19 General Code of Ohio providing for division of fines between the State of Ohio and the village, and Section 6212-37 and Ordinance No. 125 of the Village of North College Hill providing for splitting of village portion of fine with attorneys, detectives and secret-service officers, deprive defendant of a fair trial because of the money interest of all officials connected with the trial, and therefore deprives defendant of liberty and property without due process of law in violation of the 14th Amendment.

6. A trial before a mayor who conducts his court for the purpose of making money for himself, the village and officials of the court is a mask and a sham and is a denial to a defendant convicted by such a mayor of due process of law under the Fourteenth Amendment.

Edward P. Moulinier, Attorney for Pl. in Error.
Harry H. Shafer, James L. Magrish, Of Counsel.

[fol. 117] Designation of Parts of Record to be Printed

We do hereby designate the following portions of the record filed in the Supreme Court of the United States to be printed by the Clerk of the Supreme Court of the United States:

1. Affidavit for arrest before Mayor.

2. Judgment entry and costs before Mayor.

3. Entry of reversal Court of Appeals.

4. Transcript in Supreme Court showing judgment on motion to certify and petition in error.

5. The following parts of bill of exceptions:

(a) Beginning—"Mr. Shafer: I now wish to file the following motion to dismiss the defendant:" (Print entire motion.) "The Court: Motion overruled." "Mr. Shafer: Exception."

(b) The following admissions of counsel for Village:

"Mr. Shafer: Will you admit, Mr. Roudebush (Attorney for State of Ohio), that all the facts stated in the motion just made to dismiss, are true? You admit all of the allegations of the motion.

Mr. Roudebush: Wait a minute, now, there are a lot of legal conclusions and propositions in here, and a lot of things put in here about the jurisdiction of the court, and a lot of stuff of that kind.

[fol. 118] Mr. Shafer: It is just put in there——

Mr. Roudebush: What I am willing to admit is as to the facts that this money has been used for the Village, and put over into the village fund, and that it is used for village purposes.

Mr. Shafer: You admit that the Mayor owns a house in the village?

Mr. Roudebush: I don't know whether he does or not.

Mr. Shafer: Do you Mr. Mayor, own this house?

The Court: Yes.

Mr. Roudebush: We will admit that."

(c) All testimony of witness, A. H. Hoffman.

(d) All testimony of witness, Lawrence Gerrez.

(e) All testimony of witness, Harry Zimmermann.

(f) Ordinance No. 125 of the Village of North College Hill, Ohio. (Exhibit "A.")

6. Stipulation as to certain facts.

Edward P. Moulinier, Attorney for Plaintiff in Error. Harry H. Shafer, James L. Magrish, of Counsel.

Service of above designation of parts of record to be printed and receipt of copy of points to be made by plaintiff in error in the Supreme Court are hereby acknowledged, and it is stipulated and agreed that should either side desire to refer to any part of the original record, not printed, it may do so without objections.

Edward P. Moulinier, Attorney for Plaintiff in Error. Harry H. Shafer, James L. Magrish, of Counsel. Murphy & Joseph, Allen C. Roudebush, Charles M. Garhert, per H. J., Attys. for State of Ohio.

Aug. 3, 1926.

[fol. 119] [File endorsement omitted.]

Endorsed on cover: File No. 32,094. Ohio Supreme Court. Term No. 527. Ed Tumey, plaintiff in error, vs. The State of Ohio. Filed July 23rd, 1926. File No. 32,094.

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WM. R. STANS

No. 32094

Supreme Court of the United States

OCTOBER TERM, 1926. No. 527.

ED TUMEY,
Plaintiff in Error,

vs.

THE STATE OF OHIO,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD P. MOULINIER,
Attorney for Plaintiff in Error.

HARRY H. SHAFER,
JAMES L. MAGRISH,
Of Counsel.

Cincinnati, Ohio, October 29, 1926.

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No. 32094

Supreme Court of the United States

October Term, 1926. No. 527.

ED TUMEY,
Plaintiff in Error,

vs.

THE STATE OF OHIO,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE AND GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

This case comes into the Supreme Court of the United States on a petition in error filed July 23, 1926, in which the Supreme Court of the United States is asked to reverse the judgment of the Supreme Court of Ohio, rendered May 11, 1926 (R. 31), holding that no debatable constitutional question was involved and affirming the Court of Appeals for the First Ohio Judicial Circuit. On May 4, 1926, the Supreme Court of Ohio had denied a motion to require the Court of Appeals to certify its record (R. 31). The judgment of the Court of Appeals reversed the judgment of the Court of Common Pleas of Hamilton County, Ohio, which

in its turn had reversed a conviction and fine against the present plaintiff in error by the Mayor's Court of the Village of North College Hill, Hamilton County, Ohio.

The opinion of the Common Pleas Court of Hamilton County reversing the trial court is reported in 25 Ohio Nisi Prius (N.S.) 580. The opinion of the Court of Appeals is reported in XXIII Ohio Law Reporter 634.

The plaintiff in error, who at the trial was the defendant, and who is hereafter referred to for convenience as the defendant, claimed at the trial and in the appellate courts that the statutes of Ohio and the ordinance of the Village of North College Hill, Ohio, under which the trial court exercised jurisdiction and the exercise of jurisdiction were in violation of the Fourteenth Amendment to the Constitution of the United States (R. 5-9, 28). These claims were denied (R. 9, 28).

The statutory provision under which the jurisdiction of this court is invoked is Act of February 13, 1925, c. 229, Sec. 1a. The case of *Matthews* v. *Huwe*, Supreme Court of the United States, Nov. 30, 1925, 70 L. ed. 119, is cited in support of the jurisdiction of this court.

SPECIFICATIONS OF ASSIGNED ERRORS.

1. The Supreme Court of the State of Ohio erred, to the prejudice of the plaintiff in error, in giving effect to and in not holding unconstitutional and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States the following:

(a) Section 6212-19 of the General Code of Ohio, (b) Section 6212-37 of the General Code of Ohio, and (c) Ordinance No. 125 of the Village of North College Hill of Ohio (set out in full on pages 5, 6), by and through the provisions of which the State of Ohio deprived the plaintiff in error of liberty and property without due process of law.

2. The Supreme Court of the State of Ohio erred, to the prejudice of the plaintiff in error, in not holding unconstitutional and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States the trial before and exercise of jurisdiction and judgment by the Mayor's Court of the said Village of North College Hill, the said court being operated as a commercial venture, the judge of the said court being personally and as chief executive of the village financially interested in his decision, by and through which trial and exercise of jurisdiction and judgment the State of Ohio deprived the plaintiff in error of liberty and property without due process of law.

3. The Supreme Court of the State of Ohio erred, to the prejudice of the plaintiff in error, in ordering judgment to be entered and in entering judgment affirming the judgment of the Court of Appeals for Hamilton County, Ohio, and remanding the case to the Common Pleas Court for execution.

STATEMENT OF FACTS.

The defendant was arrested, after a search of his house, charged with violating the Ohio law against the possession of intoxicating liquors at White Oak, a village in Hamilton County, Ohio, on a warrant issued by the Mayor of North College Hill, another village in Hamilton County. He was taken before the Mayor of the Village of North College Hill for trial. The Mayor acted under the following sections of the General Code of Ohio, and Ordinance No. 125 of the Village of North College Hill, Ohio.

Section 6212-15:

> "No person shall after the passage of this act manufacture * * * possess * * * any intoxicating liquors * * *"

Section 6212-17:

"* * * any person who violates the provisions of this act (General Code, Sections 6212-13 to 6212-20) for a first offense shall be fined not less than one hundred dollars nor more than one thousand dollars; for a second offense he shall be fined not less than three hundred dollars nor more than two thousand dollars; for a third and each subsequent offense he shall be fined not less than five hundred dollars nor more than two thousand dollars and be imprisoned in the state penitentiary not less than one year nor more than five years. * * *"

Section 6212-18:

"Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county with whom the affidavit is filed charging a violation of any of the provisions of this act (G. C., Sections 6212-13 to 6212-20); when the offense is alleged to have been committed in the county in which such mayor, justice of the peace, or judge may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty, but error may be prosecuted to the judgment of such mayor, justice of the peace, or judge as herein provided. And in any such cases where imprisonment is not a part of the penalty, the defendant can not waive examination nor can said mayor, justice of the peace, or judge recognize such defendant to the grand jury; nor shall it be necessary that any information be filed by the prosecuting attorney or any indictment be found by the grand jury."

Section 6212-19:

"Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, one-half to the treasury of the township, municipality or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer."

Section 6212-37:

"The council of any *city or village* may, by ordinance, authorize the use of any part of the fines collected for the violation of any law prohibiting the manufacture and sale of intoxicating liquors, for the purpose of hiring attorneys, detectives, or secret service officers to secure the enforcement of such prohibition law. And such council are hereby authorized to appropriate not more than five hundred dollars annually from the general revenue fund, for the purpose of enforcing the law prohibiting the manufacture and sale of intoxicating liquors, when there are no funds available from the fines collected for the violation of such prohibitory law."

ORDINANCE NO. 125 OF NORTH COLLEGE HILL.

"An ordinance to provide for compensation to be paid from the secret service funds of the Village of North College Hill, Hamilton county, Ohio, created by authority of Section 6212-37, of the General Code of Ohio, to detectives, secret service officers, Deputy Marshals' and Attorneys' fees, costs, etc., for *services in securing evidence necessary to conviction* and prosecuting violation of the law of the state of Ohio prohibiting the liquor traffic.

"Be It Ordained by the Council of the Village of North College Hill, Hamilton county, Ohio:

"Section I. That fifty per cent. of all moneys hereafter paid into the treasury of said village of North College Hill, Ohio, that is one-half of the share of all fines collected and paid into and belonging to said village of North College Hill, Ohio, received from fines collected under any law of the state of Ohio, prohibiting the liquor traffic, shall constitute a separate fund to be called the Secret Service Fund to be used for the purpose of *securing the enforcement* of any prohibition law.

"Section II. That deputy marshals of the village of North College Hill, Ohio, shall receive as compensa-

tion for their services in *securing the evidence* necessary to secure the conviction of persons violating the law of the state of Ohio, prohibiting the liquor traffic, an amount of money equal to 15% of the fine collected, and other fees allowed by law.

"Section III. That the attorney at law of record prosecuting persons charged with violating the law of the state of Ohio, prohibiting the liquor traffic, shall receive as compensation for legal services an amount equal to 10% of the fine collected, in all cases, whether the plea be guilty or not guilty.

"Section IV. That detectives and secret service officers shall receive as compensation for *their services* in *securing* the evidence necessary to secure the conviction of persons violating the law of the state of Ohio, prohibiting the liquor traffic, an amount of money equal to 15% of the fine collected.

"Section V. That the mayor of the village of North College Hill, Ohio, shall receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases.

"Section VI. This ordinance is hereby declared to be an *emergency* ordinance, necessary to the immediate preservation of the public peace and safety, made necessary by reason of the flagrant violation of the laws of Ohio, enacted to prohibit traffic in intoxicating liquors, and shall be in effect from and after this passage."

It should be noted that by virtue of Section 6212-18 the Mayor had jurisdiction over offenses committed outside of his village, the boundaries of which are ordinarily the limit of his judicial jurisdiction and if a defendant was unable to pay the fines possible under Section 6212-17 he might be compelled to serve nearly eight years to work out the fine for a second offense.

The defendant, prior to the hearing of his case on the merits, filed a motion and a demurrer in which he challenged the power of the incumbent of the Mayor's office, Mayor

Pugh, to sit in judgment in his case, on the grounds that the statutes under which he exercised jurisdiction denied due process and resulted in the Mayor being financially interested in his decision, and that a trial before him would be a denial to the defendant by the State of Ohio of liberty and property without due process of law, in violation of the Ohio Constitution and the Fourteenth Amendment of the Federal Constitution. In support of his motion the defendant offered in evidence a certified copy of Ordinance No. 125 of the Village of North College Hill, above referred to. The defendant also showed that the total amount collected by the liquor court conducted by the Mayor from May 11, 1923, to December 31, 1923, was $20,000.00, from which the State of Ohio received $8,992.50 and the Village of North College Hill received $4,471.25, an attorney acting as prosecutor in the liquor court during this period, $1,796.50, deputy marshals, inspectors and other employes received $2,697.75, and $438.50 was paid for costs in transporting prisoners, serving writs and other services in connection with the trial of the cases. Mayor Pugh received $696.35 in fees (R. 5-9, 34). It was also shown Mayor Pugh in public speeches had advocated the continuance of the liquor court because of the financial benefit to the village and also that the mayor had stated "if the village didn't need any money he is against it, and if the village finances needs it he will run it" (R. 12). It was also testified that the village was "broke all the time" (R. 13).

The defendant showed that one of the deputy marshals who had made the arrest, had been solicited to work for the village, being hired by Mayor Pugh (R. 20). The testimony showed that deputy marshals received as compensation fifteen per cent. of the village's share of the fines collected (R. 20). The Mayor overruled the motion and demurrer and challenge to his jurisdiction, proceeded to try

the defendant, found him guilty and fined him one hundred dollars and costs and ordered him confined in the Hamilton County jail in default of the payment (R. 27-28).

ARGUMENT.

I.

When a state deprives a person of liberty or property through a hearing held under statutes and circumstances which necessarily interfere with the course of justice, it deprives that person of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Prior to the decision in the case of *Moore* v. *Dempsey*, 261 U. S. 86, 43 Sup. Ct. Rep. 265, there may have been some doubt as to whether a litigant possessed in the words of the late Professor Schofield (Schofield Constitutional Law and Equity [1921], 63, 72), a "distinct, separate and independent federal right * * * to have free, fair and impartial tribunals," for although in the prior case of *Frank* v. *Mangum*, 237 U. S. 309, the court had stated, "If a trial is in fact dominated by a mob * * * so that there is an actual interference with the course of justice, there is in that court a departure from the due process of law in the proper sense of that term," it had denied the relief which the petitioner asked, on the ground that a proper case had not been made out for habeas corpus.

It must be deemed settled now, in view of the later case of *Moore* v. *Dempsey*, that there is a distinct, separate and independent Federal right * * * to have free, fair and impartial state tribunals." In other words, the law must be deemed settled that if a state renders judgment against a litigant in a proceeding in which he is denied a free, fair and impartial tribunal, that state deprives the individual of his liberty without due process of law, in violation of the Federal Constitution.

There is no claim in the instant case that the Court was mob-dominated. "Unfairness," "partiality," "mob domination," "actual interference with the course of justice" are all terms involving matters of degree. There may be perhaps some amount of any of these elements in any case without amounting to a denial of due process. The question then before this Court is whether under the applicable statutes and circumstances there was such a degree of unfairness, partiality or interference with the course of justice as to deprive the defendant of liberty or property without due process of law.

II.

A financial interest of a court in its decision constitutes that court an unfair and partial tribunal within the prohibition of the Fourteenth Amendment.

The proposition contended for is that compelling a trial before a court which is financially interested in the result of its decision is a denial of due process of law and is supported by the following cases:

Grand Stahl v. *Board of Supervisors*, 187 Iowa 1342. The decision of a Board of Supervisors of a drainage district was attacked on the ground that one of its members was disqualified by interest. The Supreme Court of Iowa upheld the contention, and said:

> "For the moment omitting reference to exceptions to the rule, had Mr. Vorheis acted as the judge of a court in doing any act which would substantially promote his pecuniary interest he would have been disqualified. It would be sheer affectation to make an extensive citation of authorities for the proposition that one may not be 'judge in his own cause.' But see *Re Ryers*, 72 N. Y. 1. In *Case* v. *Hoffman*, 100 Wis. 314, a Supreme Court decision was held void because one judge, who had tried the cause below before he

> became a member of the Supreme Court, cast the deciding vote. *Indeed courts have gone so far as to hold that an act of assembly which authorizes one to judge his own cause would be void, because such an enactment is a denial of due process of law. Union Drainage Dist.* v. *Smith,* 233 Ill. 417, 16 L. R. A. (N. S.) 292, 84 N. E. 376; *Day* v. *Savadge,* Hobart 85, 80 Eng. Reprint 235; Cooley Const. Lim. 175; Co. Litt., Sec. 212."

Com'rs. v. *Smith,* 233 Ill. 417. An assessment for a drainage district was made by three commissioners. One of them owned a large tract of land in the district. The assessment was attacked because of this interest. The Supreme Court of Illinois held the assessment invalid, saying:

> "The present constitution of the state (Sec. 2, Art. 2) provides that no person shall be deprived of property *without due process of law.* * * * Due process of law however does not mean a proceeding pursuant to any law which the legislature may see fit to pass, whether valid or invalid, but does mean *'in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.'* "

Quotes Cooley Const. Lim. 356, and proceeds:

> "In determining what rules and forms have been established for the protection of private rights or what safeguards for the protection of individual rights the settled maxims of the law prescribe in such cases as this, we recognize the primal necessity to be laws providing *impartial tribunals for the adjudication of rights.*"

In the case of *Meyers* v. *Shields,* U. S. District Court for the Northern District of Ohio, 61 Fed. 713, the question was whether a county auditor could levy an assessment without

notice to the owner, where he was to receive four per cent. of the amount of the assessment. It was held that the assessment was the denial of due process of law in violation of the Fourteenth Amendment because of lack of notice and his interest in the decision. This case is quoted from at some length later in this brief.

In addition to the foregoing cases which involve personal financial considerations affecting the trial judges, we cite on pages 18, 19, 20, 21 cases where the financial interest of the trial judges was indirect and where trials before such tribunals were held to deny due process of law or its equivalent. In the case before this Court the interest of the trial judge was both direct and indirect. The cases holding indirect financial interest a denial of due process are necessarily also authority for the proposition that a direct financial interest denies due process.

III.

The mayor who tried the instant case was personally financially interested in his decision.

The printed record before the Court shows the Mayor's fees assessed against the defendant in the instant case were $12.40 and that the total costs amounted to $23.40 on a fine of $100.00 (R. 4). The record also shows that the fees collected by the Mayor in the period May 11, 1923 to December 31, 1923, the only period for which figures were available at the time of the trial, were $696.35. It should be noted that these fees were collected from liquor cases alone, in which the Mayor was sitting as a judge under the statutes herein complained of. The Village of North College Hill had a population, as shown by the United States Census of 1920 of 1,104. Under the law in Ohio the Mayor can receive no fees unless he finds the defendant guilty. Opinions of the Attorney General for 1915, page 148.

It has been held that the mere fact that a judge receives fees for services in trying a case does not render him financially interested in the case and therefore disqualified. This is generally necessary and proper when the payment of the fees is not dependent upon the decision being rendered one way or the other. In other words, when the question is merely whether the cost should be paid by the plaintiff or the defendant it is held, and rightly so, that the judge is not disqualified because of financial interest. Under the law, however, as it is being administered in Ohio, since the mayors of the village, sitting as courts of justice, do not receive any fees or can not receive any fees unless they convict the defendant, an entirely different situation is created. The Mayor has a direct pecuniary interest in his decision. It will be pointed out later in this brief that the mayors of villages conduct their village courts as commercial propositions for the purpose of making money for themselves and their villages and all concerned, and that the revenues from these sources amount to thousands of dollars. The financial interest then of these courts in their decisions is not only direct and immediate, but very great, and is necessarily calculated to influence them adversely to the defendant.

The opinion of the Court of Appeals, when the present case was before it, cites the case of *Probasco* v. *Raine,* 50 O. S. 378, as authority for the proposition that the fact that the Mayor collected his fees from the defendant did not render him personally financially interested in the result of his decision. The Court of Appeals in the instant case stated that the defendant claimed "that the Mayor was financially interested in that he received costs in the action." In the first place, defendant wishes to point out that his claim is much broader than the mere claim that the Mayor was interested because he received costs in the action. His claim is not only that the Mayor was personally financially inter-

ested in the result of his decision because he received fees in the action, but because such costs amounted to a substantial sum out of all proportion to the costs ordinarily collected by the Mayor in other cases, considering the population of his Village, and in addition that the Mayor was interested because of the system set up by the laws under which he operated, and also that the laws themselves were unconstitutional. The case of *Probasco* v. *Raine*, 50 O. S. 378, relied upon by the State of Ohio, is not an authority on the proposition for which it is cited, for the reason that it was overruled, from a federal standpoint, by the later case of *Meyers* v. *Shields*, Circuit Court for the Northern District of Ohio (1894), 61 Fed. 713. This is the case referred to above, under which the County Auditor was given authority by law to enter an assessment for taxes for years preceding the current year, on the general tax duplicate, and allowed the Auditor a commission of four per cent. on all taxes added by him to the duplicate. The Circuit Court had under consideration the same statute which the Supreme Court of Ohio held valid in *Probasco* v. *Raine*, 50 O. S. 378. The Circuit Court held these statutes unconstitutional, both on the ground that the statute did not provide for notice to the taxpayer, and also on the ground that the Auditor was financially interested in his decision to place or not to place the assessment on the duplicate. The District Judge discussed at some length the question of the disqualification of the Auditor, by reason of his personal financial interest in his decision. The Court said:

P. 725.

> "The object of all legislation pertaining to judicial or quasi-judicial decisions, is to furnish an impartial and wholly disinterested tribunal, before which such proceedings are instituted and carried forward. * * * The most notorious criminal enjoys the safeguard to the extent that the magistrate who presides at his pre-

after conviction, if it is made to appear that by some mistake an interested or disqualified juror has participated in the trial and verdict reached, such interest and bias on the juror's part contaminates the whole proceeding, poisons the fountains of justice at their source, and makes the verdict null and void. * * * p. 727. The fee is evidently not intended to be given in the nature of compensation for services alone. It is therefore not only in the nature of a bribe to decide against the citizen, but a corrupting inducement to make his finding the largest possible. * * * Thus we have a system judicial in its character, which rewards not only the witnesses by a commission upon the amount of taxes recovered by reason of their testimony, but also provides a commission of four per cent. to the officer who conducts the proceedings and who awards the amount of the taxes to be assessed and collected."

IV.

The mayor who tried the instant case was financially interested in his decision as executive head of his village and was operating his court as a commercial proposition for the purpose of making money for his village.

Under General Code Sec. 6212-19, one-half the money collected from fines in liquor cases is paid to the treasury of the municipality where the prosecution is held, whereas in other state misdemeanor cases the municipality receives nothing. General Code Sec. 4270 provides "* * * Except as otherwise provided by law, all fines and forfeitures collected by him (the Mayor) in state cases together with all fees and expenses collected, which have been advanced out of the county treasury, shall be by him paid over to the county treasury on the first business day of each month." The record shows that from the period May 11, 1923 to December 31, 1923, the period for which figures were available at the time of the trial, the share of the Village of

North College Hill amounted to $4,471.25, that under Ordinance No. 125 the Village of North College Hill received 25% of the total fines collected, and hence would receive from the present defendant $25.00, and that the greater the fine assessed, the greater the amount the village would receive. The record shows that the Mayor of North College Hill, who conducted the trial, had stated (R. 12): "If the village did not need any money he is against it (operating a liquor court), and if the village finances needs it, he will run it." The record also shows that when a decision to run a liquor court was made, the Village of North College Hill was "broke." So, aside from the personal financial interest of the Mayor, the record is clear that the Mayor was operating the court in order to make money for the village of which he was executive head, which village was in low finances. The greater the fine assessed by the court, the greater the amount of money which the village would receive.

Defendant contends that the Mayor's interest as an executive head of the village, his operations of the court as a commercial venture to make money for the village, all made his so-called court not a court of justice, but a mask and a sham, in which there were the forms of judicial proceedings, but in fact no real judicial hearing. The cases are clear that such an interest is sufficient to disqualify, and that a trial before such a tribunal constitutes a deprivation of liberty and property without due process of law. It is no answer to the defendant's contention that any judge who is a taxpayer is interested in the fine which he assesses, because he wishes to have his municipality or county or state receive fines. It is one case where a court is run as a regular and ordinary judicial court, and assesses fines in the regular and normal and ordinary way. It is a different case, however, when a court is run for the express and

avowed purpose of making money, as was the situation in the proceedings under which the defendant was fined. Physical intimidation of a court is easily seen and can more easily come under the condemnation of a reviewing court than the influences such as were operative upon the trial judge in the instant case. The influences that were operative on the trial judge in the instant case were nevertheless real, are shown by the record and were of as pernicious a character, if not more so, than physical intimidation of a trial judge. Physical intimidation is apt to occur only in isolated cases, whereas the influences that were operative in the instant case were intended and actually were operative not in isolated cases, but as a permanent motive and incentive to the operation of the court. Is a trial before such a court a trial by due process of the law as guaranteed by the Constitution of the United States?

It is well known that the English courts frequently reach the results reached by our American courts under the doctrine of due process of law under their doctrine of natural justice. For these reasons the English cases about to be mentioned are in point on the proposition that a trial before a tribunal financially interested, as this court was, in the result of its decision constitutes a denial of due process of law. In *Day* v. *Savadge*, Hobart 87 (1615), Day brought suit against Savadge for taking away a bag of nutmegs. Savadge was collector of the City of London, and had seized and forfeited the nutmegs for non-payment of wharfage due. Plaintiff pleaded that there was a custom of London under which he did not have to pay the dues. The defendant denied this and set up the custom of the City of London that the Mayor or Aldermen could certify their custom to the court, and that this certificate was conclusive, being so made by an act of Parliament. The question was whether such a certificate concluded the plaintiff and de-

prived him of a jury trial on the question. The Court held that by such a certificate the Mayor in effect judged his own cause and that this was illegal. Lord Chief Justice Hobart said:

> "By that which hath been said it appears that though in pleading it were confessed, that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, *and because even an act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself,* for *jura naturae sunt immutabilia,* and they are *leges legum.*"

In the *City of London* v. *Wood,* 12 Mod. 669, 688 (1701), an action was brought by the City of London in the court of the Mayor and Aldermen against one Wood, who was sheriff, for forfeiture of 400 pounds, on the ground that the sheriff had not properly performed his duties. There was a trial and judgment against the defendant in the Mayor's court, on an appeal to the King's Bench, Lord Chief Justice HOLT said at page 687:

> "But the great point is, that the court is held before the mayor and aldermen, and the action brought in the names of this mayor and commonalty; *and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought;* and this can not be by the rules of any law whatever, for it is against all laws that the same person should be party and judge in the same cause, for it is manifest contradiction; for the party is he that is to complain to the judge, and the judge is to hear the party; the party endeavors to have his will, the judge determines against the will of the party, and has authority to enforce him to obey his sentence; and can any man act against his own will, or enforce himself to obey? * * * And

> what my Lord Coke says in Dr. Bonham's case in his 8 Coke is far from any extravagancy, for it is a very reasonable and true saying, *that if an act of parliament should ordain that that same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament;* for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature; *but it can not make one that lives under a government judge and party.*"

In the case of *Landfear* v. *Mayor*, 4 La. 97, an ordinance of New Orleans permitted the Mayor to sell property left on the levy for a longer time than the rules permitted. The Court held such action invalid, and said:

> "The power conferred by the city ordinance in question makes the corporation judges and parties in the same cause, and enables them to enforce a forfeiture and divest the owner of his property, without trial in due course of law. We are of opinion that no such power is conferred by this act of incorporation, and that none such could be constitutionally conferred."

The following cases, briefly noted, show various degrees of money and other interest which were held to disqualify:

Pierson v. *Atwood*, 13 Mass. 324 (1816), is a leading American case, holding that any money interest, however small, deprives a litigant of a fair trial.

Gregory v. *Railroad*, 4 O. S. 675 (1854), a leading Ohio case, held that where one of the judges had an interest in a corporation which was in litigation before him, the judge was disqualified and quotes 13 Mass. 324.

State v. *Young*, 31 Fla. 594, 19 L. R. A. 636 (1893), holds that where a probate judge, who was a vestryman in a church which was a beneficiary under a will, could not act as judge. The Court said: "That the interest may not be beneficial pecuniarily to the individual wardens or vestrymen, does not make it any the less a property interest." The note of L. R. A. is: "The disqualification of a judge for interest in a purely fiduciary capacity is a subject hitherto hardly touched upon, to which the above is a valuable contribution."

Nettleton's Appeal, 28 Conn. 267 (1859), held that a judge was disqualified who was one of the select men of a town, and a necessary party to the application to appoint a guardian for an incapable person.

Dimes v. *Grand Junction Canal*, 3 H. L. 759 (1852). This is a leading English case. In a certain litigation the Lord Chancellor had an interest as a shareholder in a company which was a party, although the case was heard by the Vice-Chancellor whose decision was affirmed by the Chancellor, it was held that the Chancellor was disqualified. Lord Campbell said: "This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

Moses v. *Julian*, 45 N. H. 52, 84 Am. Dec. 114 (1863). In this case the probate judge had drawn a will which was afterwards probated before him. Held that the judge was disqualified. The Court say: "*It is one of the great principles of the common law, for which the people of England had struggled for ages, and which they ultimately succeeded in establishing against the strenuous efforts of a tyrannical government. We can have no higher authority than this for denouncing as illegal everything which interferes with the entire impartiality of every legal tribunal.*"

Stockwell v. *Township,* 22 Mich. 341 (1871). Stockwell was moderator of a school district, and as such refused to pay Porter for work done. Porter and other members of the school board ousted Stockwell as a moderator. Held that such action was illegal because of the maxim, "no one shall be a judge in his own cause."

State v. *Crane, Collector,* 36 N. J. L. 394 (1873). One of the commissioners of a township made an assessment for building a road. He owned property along the road. It was held that the assessment was invalid because of his interest. The Court quotes Hobart 87. The Court say, page 403: "The Chief Justice, in *Schroeder* v. *Ehlers,* says 'that a person can not be a judge in his own case, has ever been regarded as one of the fundamental maxims of the laws of nature'; also, *"that the injustice of allowing it is intuitive in the human mind.* In my judgment, the legislature is impotent to break down this great barrier to tyranny and fraud."

Stuart v. *Commonwealth,* 91 Va. 152 (1895), held that where a judge had approved a bond of a defaulting treasurer, he could not hear the suit on the default. The Court say, page 157: "We can not sanction a practice which could by possibility be drawn into a precedent, *and which might or could render the judiciary of the State the objects of suspicion and of criticism, and tend to impair public confidence in their utter and complete disassociation from the subject matter of their official action."*

Findley v. *Smith,* 42 W. Va. 299 (1896). Where a judge had assigned a claim which afterwards was part of a litigation before him, the judge became disqualified. The Court say, page 305: "And where there is a direct necessary interest, it matters not how remote the interest may be, or how small or insignificant in amount; the *maxim (disqualification for interest) must be held sacred, and even the appearance of evil be avoided."*

State v. *Seattle Board of Education*, 19 Wash. 8, 17, 40 L. R. A. 317 (1898). A trial for removal of a superintendent of public schools was held before a board. Defendant objected that one of the members of the board had said he would find defendant guilty. The Supreme Court held that the trial was illegal. The Court say, page 17: "Actions of courts which disregard this safeguard (disqualification for interest) to litigants would more appropriately be termed the administration of injustice, and these proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. * * * *Caesar demanded that his wife should not only be virtuous but beyond suspicion; and the state should not be any less exacting with its judicial officers.*"

Ex parte Cornwell, 144 Ala. 497 (1905). A man was tried for embezzlement before a judge who had been a depositor in the bank which had lost the money by the act of defendant. Held, the judge was disqualified. The Court says, on page 498: "*The judge is human, and human nature at best is weak, and as far as it is possible a perfect equipoise should always be preserved in the administration of justice by the courts.*"

Yazoo R. R. v. *Kirk*, 102 Miss. 41 (1912). A trial was held before a judge whose son and brother-in-law were attorneys for one of the parties. The judge was held disqualified. The Court say, page 54: "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence aliunde the record." The Court refers to the collection of cases in *Moses* v. *Julian*, reported in 84 Am. Dec. 114.

V.

The statutes of Ohio and the ordinance of the village of North College Hill which created the system under which the mayor operated violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Just as it has been settled by repeated cases, for example, that a statute which provides for no notice on the taking of property is unconstitutional, so, we submit, it is settled by repeated cases that statutes which on their face provide for unfair trials are also unconstitutional. Taking the example cited by the judge of the Court of Common Pleas, who reversed the Mayor's Court in the instant case, if a statute gave to the Chief of Police or arresting officer the power to sit in judgment upon a defendant, such statutes would clearly be unconstitutional, and we could clearly and unhesitatingly say that such trials would necessarily be unfair and denials of due process of law.

Under General Code Sec. 4385

> "The marshal shall be the peace officer of the village and the executive head, *under the mayor*, of the police force. * * *"

In the instant case one of the arresting officers, a deputy marshal, testified that he was hired by the Mayor, in fact that the Mayor solicited him to work for the village. In isolated cases the evil may not be so great as to call for judicial intervention when such a Mayor acts as a judge. When, however, he acts as a judge regularly and as a commercial proposition, a different situation is created and one that does call for judicial intervention. In the words of Judge Struble, the Common Pleas Court who reversed the Mayor's court, 25 O. N. P. (N.S.) at page 603:

> "Mayors in their way of functioning violate this fundamental principle of government, but so long as

> they were left alone to exercise a very minor jurisdiction within their own municipality, where the people had the power of political restraint, it was not a matter of serious concern, but for the enforcement of prohibition they were given final jurisdiction co-extensive with the county, of an entirely new class of crimes penalized with heavy fines only, and with amazing freedom of action in the exercise of this jurisdiction, and it is a matter of serious concern when the council of a village can organize a force under its mayor and set him to functioning in his joint capacity as executive and judge co-extensive with the county in enforcing prohibition or any other class of crimes."

The second ground for declaring the statutes themselves unconstitutional is that they provide for a division of the fines on a percentage basis between the State of Ohio, the village and prosecuting and arresting officers. We submit that the Court can and should find that such statutes are necessarily calculated to harness the greed and cupidity of men in the exercise of a function to which our Constitution does not allow greed and cupidity to be harnessed. The statutes considered in the light of things of which the Court can take judicial knowledge, are necessarily calculated to bring about unfair trials and are therefore violative of the Fourteenth Amendment.

We asked the lower courts, and we ask this Court, to take judicial knowledge of the report of the investigation of justices' and mayors' courts of Lucas County, Ohio, made by the office of the Attorney-General of the State of Ohio. This report was called to the attention of the lower courts, and they were also asked to take judicial knowledge of it, on the ground that the report was published in newspapers of Ohio, and were a matter of general notoriety in the state. From an examination of courts operating under the statutes which are now attacked, the Attorney-General's office

reported on May 2, 1924, and accounts of the report appeared in the press of Ohio on May 2 and May 3, 1924.

"The following figures were compiled by Mr. J. C. Tuttle, Assistant Examiner, from the records of one justice court alone; and they are significant as indicating the extent of the business done and the relative importance of fines as compared with costs:

1270 cases tried under Section 6212-19, Crabbe Act, of Justice of the Peace.

Total costs of justice	$10,271.30	
Total costs of constable, papers and mileage	11,855.20	
Total costs for assistants	6,287.55	
Total costs of transporting prisoners	6,193.50	
Total costs of transporting evidence	7,410.75	
Total costs Ch. and interpreter	401.00	
Total costs sheriff, including one day's board	1,165.50	
	$43,384.80	
Total fines	$157,400.00	
Fines suspended		$ 22,922.55
Fines collected		81,898.00
Fines uncollected		50,379.45
Jail fines		2,200.00
		$157,400.00

An examination of these figures shows that the enforcement of the prohibition law became very largely a commercial proposition with these courts, and it is apparent that the practices which developed were a more or less logical result of conferring upon courts, whose income depended upon collection of costs, a jurisdiction where a large volume of business might be expected. * * *

From conversation with many of the officers operating from these courts and with the citizens who had been brought before them, it was clear that there developed an inevitable tendency to subordinate the right of persons brought before the court to considerations of business policy. * * *

* * * * *

The tendency to attempt to place law enforcement on the basis of business efficiency and the results which followed from that tendency are illustrated by the following examples, which are merely a few out of many such examples that might be cited:

One mayor made it a practice to sign blanks for search warrants, affidavits, mittimuses and releases, and to place them in the hands of his officers so that they could fill them out to suit whatever case might come to them. A large quantity of these documents, signed in blank, were issued. This of course, resulted in searches being made that were not supported by any affidavit, arrests made on warrants that were never legally issued and commitment to jail on mittimuses never actually issued by a court. This was done more or less openly in the presence of the defendants. The fact that most of the victims were foreigners, ignorant of their rights under American legal procedure and accustomed to the arbitrary and tyrannical procedure of Europe, was taken advantage of by the officers of these courts.

* * * * *

It seems to have been a more or less general practice on the part of courts and officers to secure pleas of guilty by threats of action by the federal court or by threats of imposition of heavy fines if pleas of guilty were not made.

* * * * *

Another feature of the practice which is especially repulsive was the spirited contest which was constantly waged among the corps of constables, marshals and deputies from various courts. This conflict became so severe at times that the jail matron complained of the

> commotion caused by these officers, standing just outside the county jail and berating each other for 'knocking off' certain individuals from one court before those individuals had paid their fines in another court. The whole spirit surrounding this procedure gives evidence of the fact that the violators of law were looked upon, not as offenders against the dignity of the State, but merely as sources of revenue, to be zealously guarded."

The evidence in the above report is of what actually resulted from the operation of the statutes complained of, and we submit that they show what necessarily results from them, namely unfair trials, and therefore such statutes are unconstitutional.

A liquor court in Milford, Hamilton County, Ohio, collected from fines from March 19, 1922, to December 31, 1923, the amount of $235,141.00, as shown by a report in the State Auditor's Office at Columbus, and one-half of this was used by the Village for public improvements and the payment of fees to officials of the court.

It might be argued that such considerations which the defendant urges upon this Court, should more properly be urged to the Legislature. We submit, however, that they are properly urged before this Court. The citizen is not at the mercy of a legislature which provides for a necessarily unfair trial. Although a state may use all reasonable means to abate an existing evil, the means adopted by the Legislature of Ohio oversteps constitutional bounds. To enforce a law the Legislature is powerless to go so far as to set up a system which necessarily results in trials which are masks and shams, such as is inevitably the case with trials under the statutes herein complained of. Our proposition is that the statutes which necessarily create trials which are masks and shams are unconstitutional, and complaints of such unfair trials are properly addressed to the Courts of the United States under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION.

Defendant respectfully submits that the judgment of the Supreme Court of Ohio should be reversed and the judgment of the Common Pleas Court, reversing the judgment of the Mayor's court, should be affirmed, for the reason that by such judgment the State of Ohio deprived the defendant of liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in that, first, under the statutes of Ohio and the circumstances of the case the trial judge was personally financially interested in his decision; secondly, that the Mayor or trial judge was interested as an executive head of his village; and thirdly, that the statutes under which the defendant was tried are unconstitutional because they necessarily resulted in such unfair trials.

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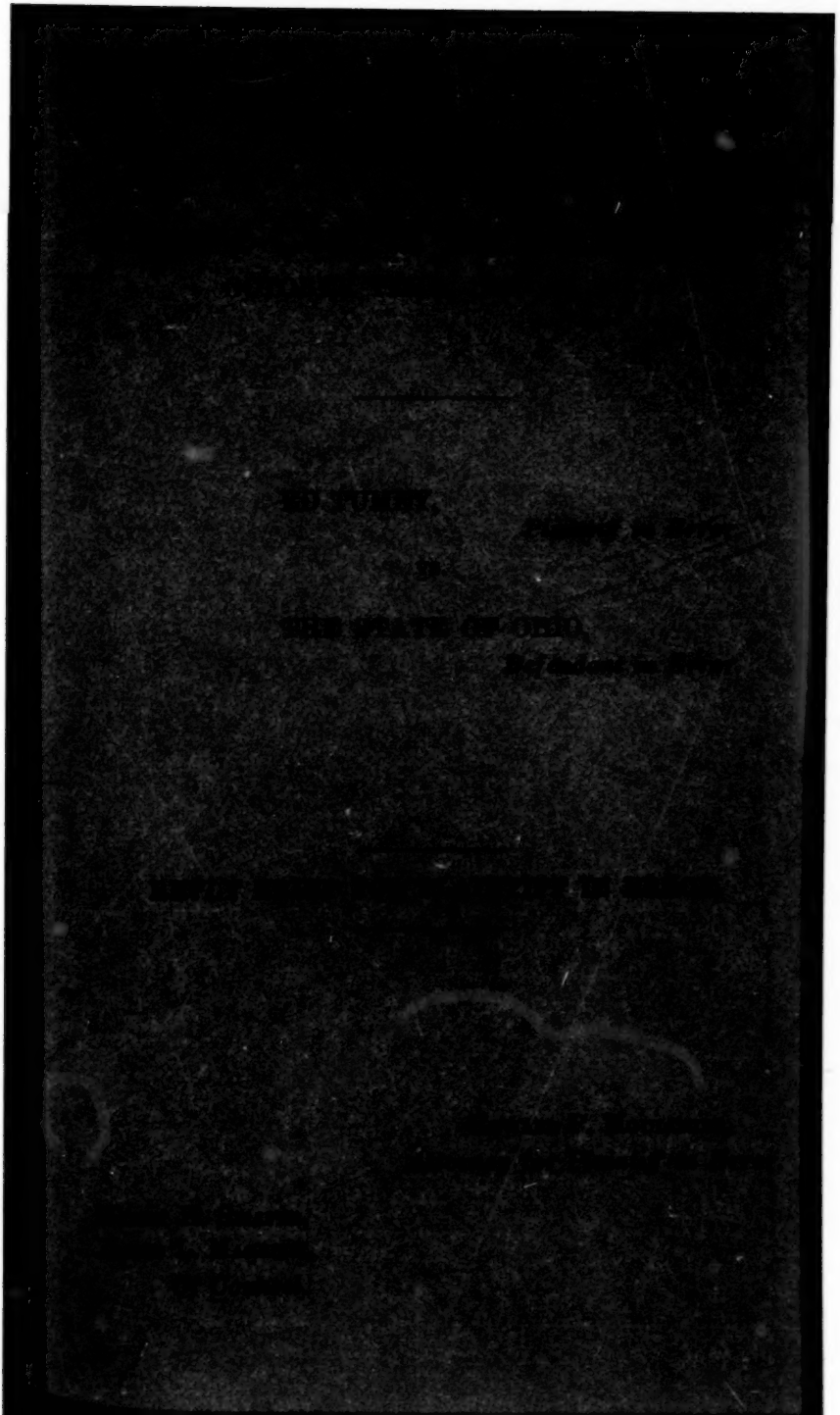
Attorney for Plaintiff in Error.

HARRY H. SHAFER,
JAMES L. MAGRISH,
Of Counsel.

Cincinnati, Ohio, October 29, 1926.



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No. 32094

Supreme Court of the United States

OCTOBER TERM, 1926. No. 527.

ED TUMEY,

Plaintiff in Error,

vs.

THE STATE OF OHIO,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

ANSWER TO CLAIM THAT CASE PRESENTS NO FEDERAL QUESTION. (Opp. Brief 3.)

Opposing counsel say in their brief (p. 3): "The plaintiff in error by testimony sought to prove the mercenary motive of the village officials (R. 9). The state courts on the evidence, found against the contentions of the plaintiff in error. It is well settled that the court will not review the findings of a state court upon questions of fact" (citing cases).

It is of course true that this Court will not review the findings of a state court upon questions of fact. It is also true, however, that there are in this case no findings of a state court upon questions of fact, and that the record in this Court does not present questions of fact, but questions of law. The material "facts" in this case are admitted,

namely that the Mayor of North College Hill operated his court under Sections 6212-18, 6212-19, 6212-37 of the General Code of Ohio and Ordinance No. 125 of the Village of North College Hill. The question before the Ohio courts was, and the question before this Court is, whether by reason of said statutes and ordinance the Mayor was financially interested in his decision, and whether, therefore, the statutes which necessarily made for such interest and the exercise of jurisdiction thereunder deprived the defendant of liberty and property without due process of law, in violation of the 14th Amendment of the Federal Constitution.

The correctness of this view may be further shown by a consideration of the frequent practice of courts in passing upon the constitutionality of statutes passed under the police power. The claim is frequently made as to such statutes that they are "unreasonable," and the courts frequently hear evidence on the reasonableness of the statute, and more frequently allow statements in the briefs of counsel citing authorities on the questions of "fact," namely whether the particular police-power statute bears an unreasonable relation to the evil sought to be corrected. In a sense then the finding, whether an ordinance is or is not reasonable, involves a finding of "fact," but no one would contend that it is such a finding of "fact" as is referred to in the cases cited by opposing counsel's brief, p. 3. We repeat, the questions before this Court are whether the statutes themselves complained of are unconstitutional, because necessarily making for unfair trials, and whether the exercise of the Mayor of jurisdiction under these statutes was unconstitutional because under the statutes and circumstances the Mayor was financially interested in his decision and these are questions of Federal Constitutional law.

ANSWER TO CLAIM THAT STATE COURT OPINION SHOWS NO FEDERAL QUESTION NECESSARY TO ITS DECISION. (Opp. Brief. 5.)

Whether or not a case presents a federal question, must be determined not alone from the opinion of one of the courts passing upon the record but from the record itself. The opinion of the Court of Appeals does not show that no federal question was raised; on the contrary it states: "Counsel for defendant in error in the brief argues that the constitutional rights of the defendant are invaded in that the judge receives costs in a case, and therefore has a pecuniary interest, thus preventing defendant from having a fair and impartial trial." (Opposing brief, p. 22.)

The Court of Appeals further found in its entry reversing the Court of Common Pleas: "The Court further finds that defendant in error claimed that the Mayor exercised jurisdiction in this case in violation of Section 1 of the 14th Amendment of the Constitution of the United States * * *." (R. 28.)

Opposing counsel also argue that the validity of no state statute was drawn in question, and therefore under Section 237-a of the Judicial Code a writ of error was improperly taken. Even if this were true, defendant overlooks Section 1214 Comp. St. Act, Feb. 13, 1925, c. 229, par. 1 of the Judicial Code, which provides that where a writ of certiorari is a proper remedy, but a writ of error was taken, the Court may consider the writ of error as a writ of certiorari. We strenuously contend, however, that it is not necessary for this Court to consider the writ of error as a writ of certiorari, for the reason that the validity of statutes was drawn in question throughout the entire proceedings.

On page 5 of the record appears the motion to dismiss, made before the Mayor, and it is in part as follows: "In this case the Mayor of North College Hill intends to conduct the proceedings against defendant * * * by virtue of the prohibition laws of the State of Ohio which purport to give jurisdiction to a mayor of the municipality in the county in which the municipality exists, in state cases for a violation of liquor laws * * *." It was contended that conducting of the proceedings under such laws denied due process.

It is a matter of statement, with no difference in fact, whether we say the exercise of jurisdiction under the statutes was unconstitutional or that the statutes are unconstitutional. One can not complain that statutes are unconstitutional unless they affect him, the complaining party. So when one states that exercise of jurisdiction under the statutes is unconstitutional, he necessarily states that the statutes are unconstitutional and that the unconstitutionality affected him. The opinion of the Court of Common Pleas states, 25 O. N. P. (n.s.) 581: "This subject-matter concerns the legality of the so-called commercialized enforcement of prohibition, accomplished by organizing mayors of villages, known as liquor courts, under authority of Section 6212-37 G. C. O., and using them as special instruments in enforcing prohibition coextensive with the county * * *." Section 6212-37 is quoted and Ordinance No. 125 of the Village of North College Hill is set out in full.

The record therefore shows a federal question and one that is properly cognizable on a writ of error.

ANSWER TO ARGUMENT THAT EVERY STEP TAKEN WAS AUTHORIZED BY LEGISLATIVE ENACTMENT. (Opp. Brief 5.)

A procedure authorized by legislative enactment is procedural due process when the *legislative enactments are valid.* If, however, the legislative enactments are themselves invalid, the argument that the procedure was authorized by legislative enactment and is therefore due process amounts to an attempt to lift oneself by his own boot-straps. Legislative enactment is used in the major premise to refer to a valid legislative enactment, but in the minor premise is used to refer to any enactment by a legislature. Very obviously there is a great difference between the two.

Related to this claim is opposing counsel's claim (Brief 15), that courts can not declare a policy different from that fixed by the Legislature. This statement is true if it is intended to refer to policies validly fixed by the Legislature, but is obviously untrue if the policy fixed is an unconstitutional one.

Opposing counsel repeat in substance the language of the Ohio Supreme Court in two cases. In *Probasco* v. *Raine,* 50 O. S. 378, the court makes that statement and in effect refused, on the constitutional question raised by the lawyers for Probasco, to make any inquiry into the facts to determine whether due process of law had been denied. But the Probasco case was reversed from a federal standpoint by *Meyers* v. *Shields,* 61 Fed. 713.

The Supreme Court of Ohio in *Pohl* v. *State of Ohio,* 102 O. S. 474, says:

> "The inexpediency, injustice or impropriety of a legislative act is not a ground upon which the court may declare the act void."

This case was reversed by the U. S. Supreme Court in *Myers* v. *Nebraska,* 262 U. S. 390, and the court held that the Ohio statute, forbidding the teaching of German in the State, was destructive of the common-law right of a free citizen. The Court of Appeals in our case uses the language of the Probasco case, and all three cases refused to inquire into the facts to determine whether or not due process of law had been denied. The United States Courts, in both the Probasco and Pohl cases take the view that we are contending for here, that where the facts show a deprivation of a citizen's constitutional rights of due process of law, the State enactment must be declared void.

ANSWER TO CLAIM THAT MAYOR'S INTEREST IN COSTS ALLOWED BY LAW UPON CONVICTION DID NOT DISQUALIFY HIM. (Opp. Brief 10.)

Opposing counsel say (Brief, p. 19): "The receipt of his (Mayor's) fees were not necessarily contingent upon the conviction of the accused." We believe counsel to be inadvertent in this statement. Section 3019 G. C. O. provides:

> "*Allowance wherein state fails or defendant insolvent.* In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in the place of fees, but in no year shall the aggregate allowance to such officer exceed the fees legally taxed to him in such causes, nor in any calendar year shall the aggregate amount allowed such officer and his successor, if any, exceed one hundred dollars. If there be a successor, said amount shall be pro-rated on the basis of lost fees."

The Ohio Attorney-General, in construing this section (Opinions of Attorney-General for 1915, page 148), said:

> "No allowance in place of fees can be made in misdemeanor cases by the county commissioners to a justice or other officers under Section 3019 G. C. O. unless the defendant is convicted and proves insolvent."

This opinion has been followed in Ohio by the financial departments, and no mayor has been able to collect even up to one hundred dollars a year for fees in misdemeanor cases unless he has shown convictions and insolvency of defendants.

In the instant case the Mayor received one hundred dollars a month as fees during seven months. The Mayor of Milford in fifteen months received $5,900.00 in fees. The fees under jurisdiction other than liquor cases would be practically nothing. The population of Hamilton County was 510,000. The population of North College Hill was 1104 and of Milford in Hamilton County 71. This extended their jurisdiction in one case over four hundred times and in the other over seven thousand times. Hamilton County has three cities and twenty-three villages in its territory.

ANSWER TO CLAIM THAT PROVISION AUTHORIZING FEES FOR INFORMERS AND PROSECUTING ATTORNEY IS CONSTITUTIONAL.

(Opp. Brief 13.)

The complaint made in the instant case is not based alone upon the informers and prosecuting attorney receiving fees. In the ordinary case of informers receiving parts of the fines, the trial is conducted not by executive

officers who appoint the informers, but by judicial officers entirely separate and independent of the informers. It is an entirely different matter where the executive branch of the government which appoints the informers, who receive percentage of the fines, is also the judge of the guilt of the persons accused by the informers.

NO CLAIM THAT MAYOR'S INTEREST AS TAXPAYER DISQUALIFIED HIM; OUR CLAIM IS THAT AS MAYOR HE WAS INTERESTED IN INCREASING THE VILLAGE FINANCES. (Opp. Brief 12.)

Opposing counsel (Brief 12) states that "Complaint is also made that because a portion of the fines are paid into the municipal treasury the Mayor as a taxpayer has such an interest as to disqualify him," and cites cases that the interest of a judge as a taxpayer does not disqualify him. Cases which hold that interest of a taxpayer does not disqualify a judge, are necessarily correct, but plaintiff in error does not base any argument upon the fact that the Mayor is a taxpayer, although this was brought out at the trial. The complaint is that the Mayor was financially interested personally in the fees which he would not get unless he found defendant guilty, and also in the fines which the Village of which he was executive head would get only if he found defendant guilty.

Opposing counsel confuse a claim we did not make with one we did and do make (our brief, p. 14). The interest of the Mayor as executive and the interest of the Village was to get as much money as possible from the running of the court. Before the liquor laws were passed, the Village did not share in any state fines. The Mayor

had jurisdiction in small state cases where only a fine was imposed, but these are comparatively few, and all the fines went to the State. Section 4270 G. C. O. provides: "Except as otherwise provided by law, all fines and forfeitures collected in state cases shall be paid to the county treasury the first business day of each month." The exception spoken of refers to cases where the fines go directly to the State treasury. The framers of the laws we are attacking intended to appeal to both the interest of the Mayor and the Village in the grant of half of the fines to the Village. In the language of Judge Ricks in *Meyers* v. *Shields,* (61 Fed. 727), this was a bribe to decide against the citizen, and a corrupting influence to make the fines large. We have been able to find no laws either in Ohio or elsewhere creating a mayor the head of a similar money-making system for the advantage of the village. The executive powers of a mayor are defined in the following sections of the G. C. O.

> Sec. 4248. The executive power and authority of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law.
>
> Sec. 4255. He (the Mayor) shall be the chief conservator of the peace within the corporation. * * * He shall be the president of council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.
>
> Sec. 4258. * * * He shall see that all ordinances, by-laws, and resolutions are faithfully obeyed and enforced. * * *
>
> Sec. 4259. The mayor shall communicate to council from time to time a statement of the finances of the municipality, and such other information relating thereto and to the general condition of the affairs

of the municipality as he deems proper or as may be required by council.

Sec. 4262. The mayor shall supervise the conduct of all the officers of the corporation. * * *

We submit that there must be some line of cleavage between what is constitutional and unconstitutional in the grant of judicial power to a Mayor. That point has been over-stepped, in our opinion, in the laws now being attacked. The free citizens of a country can not be validly judged by such an unconstitutional system.

Under this heading we desire to call further attention to a case spoken of in the main brief. We refer to Dr. Bonham's case, 8 Coke 114a, also reported as College of Physicians case in 2 Brownlow 255. The facts and law are, we believe, pertinent here. The Royal College of Physicians were granted by statute 14 and 15 Hen. VIII powers to fine persons who practiced medicine in London without their consent, and providing for a fine and imprisonment for such action, the fine going one-half to the Crown and one-half to the College. Bonham, who had a degree of Dr. of Physic from the University of Cambridge, practiced without such consent in London. He was summoned to trial before the President and censors of the College and first fined 100 shillings, which he did not pay, and then ten pounds, which he did not pay, whereupon he was arrested and put in Fleet Street prison. He then brought suit against the censors for false imprisonment. Dr. Bonham, in his replication, stated that the trial was void because the statute was void. A demurrer was filed to this and Lord Chief Justice Coke, with Associates Warburton and Daniel, decided the case in 1610. They held that Bonham could recover on the ground that the proceedings were void, even though authorized by Act of Parliament,

because the President and censors were acting as judges in a case in which they were interested. The Court say, 8 Coke 118a:

> "The censors can not be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suae rei esse judicem;* and one can not be judge and attorney for any of the parties."

This case is cited generally in the United States for the doctrine here contended for.

ANSWER TO CLAIM (Opp. Brief 16) THAT OUR CASES (Brief 18 to 21) NOT IN POINT.

It is quite true that most of these cases are concerned with civil litigation, as were the English cases. But this does not lessen their pertinency. The property and liberty of citizens involved in criminal cases are just as important to our constitutional system as in civil cases. It is most important to the citizen that the judiciary in criminal cases should be kept clean and pure. The language of the cases we have cited is not exaggerated. The judicial process must be kept free from scandal and sinister influences, otherwise the people will lose confidence in their system of government, and grave evils will follow.

We refer the court to a recent criminal case in New York, involving some of the questions we are arguing. In *People* v. *Ibey*, 201 N. Y. S. 222 (1923) the defendant was charged with stealing a motor truck. He pleaded guilty before the police magistrate of the Village of Clayville. Later on his lawyer discovered that the police

justice and the prosecuting witness were employes of the company that owned the truck. The appeal court held that notwithstanding the plea of guilty, the interest of the police justice made the sentence of the court void. The court say, page 224:

> "That there was no question of fact to try due to a plea of defendant does not signify, because the very important matter of the size and extent of the sentence was in the hands of this magistrate. I think he must be held to have been interested."

The sacredness of the principle we are contending for applies to all judicial or quasi-judicial processes, and any lowering of the standard is dangerous.

See also *Massey* v. *Comm.*, 93 Ky. 588.

CONCLUSION.

To summarize: The Ohio liquor statutes are unconstitutional because they provide for a money-making judicial system heretofore unknown in criminal law. The mayor is given county-wide jurisdiction and the village receives half of the fines in these state cases for the first time in Ohio's legal history, the prosecutor and secret-service men share in the fines, the mayor receiving fees. All these persons work for the village and no one receives a cent of pay or fees or costs unless defendants are convicted. The money interest of every one is therefore to convict and make the fines large, and the mayor who is executive and judge is interested as head of the system. This necessarily results in destroying the fundamental requirement of judicial impartiality and deprives citizens of due process of law in violation of the federal constitution, making the trials masks and shams. It has the

form of law but lacks the substance of right. As bearing on this situation we quote as follows:

Cooley's Constitutional Limitations, 7th Ed., Page 243: "And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government."

Meyers v. *Shields,* 61 Fed. 713, 726: "But in the eager and hot pursuit of a citizen who wrongfully evades his just taxes, we must be careful not to graft upon the body of our judicial system proceedings so arbitrary and summary that they may hereafter be the basis and precedent for laws dangerous in the highest degree to the personal liberty and property rights of every citizen."

Boyd v. *U. S.,* 116 U. S. 616, 635: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

Kent's Commentaries, Vol. 1, p. 494, 7th Ed.

Respectfully submitted,

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Cincinnati, Ohio, November 17, 1926.

FILED
DEC 16 1926
WM. R. STANSBURY
CLERK

No. 32094

Supreme Court of the United States

OCTOBER TERM, 1926. No. 527.

ED. TUMEY,

Plaintiff in Error,

vs.

THE STATE OF OHIO,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Opinion of Judge Struble of Common Pleas Court, Hamilton County, Ohio.

Digest Laws of States on Fees to Minor Courts.

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No. 32094

Supreme Court of the Unied Sttates

OCTOBER TERM, 1926. No. 527.

ED. TUMEY,

Plaintiff in Error,

vs.

THE STATE OF OHIO,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Opinion of Judge Struble of Common Pleas Court, Hamilton County, Ohio.

Digest Laws of States on Fees to Minor Courts.

The Village Courts Could Validly Function in Trials Under Their Own Ordinances, but They Are Unconstitutional Courts when Their Village Shares in Fines Inflicted by Said Courts on a County-Wide Population in State Cases.

At the hearing we cited authorities and made some oral arguments not contained in our former briefs, and are including them here.

Dillon on Municipal Corporations says, Sec. 741, Vol. II, 5th Ed.:

> "The common law doctrine respecting municipal courts was settled to be that the municipal corporation could bring no action therein against a stranger where the effect would be to benefit the corporation or increase its funds, for that would be to make the corporation itself both judge and party which an inflexible and fundamental maxim of the common law prohibited; and the same principle was considered to operate to disqualify corporators to sit as jurors in such cases; but this objection did not apply when both parties were both corporators."
>
> Citing *Hesketh* v. *Braddock*, 3 Burr., pp. 1847, 1856, 1858. Mansfield.
>
> See *Charleston* v. *Pepper*, 1 Rich. (S. Car.) Law 364.

In *Hesketh* v. *Braddock*, 3 Burrows, p. 1858 (A. D. 1766), Lord Mansfield said:

> "In the regulation of their own members they may indeed make by-laws and enforce the observance of them by prosecutions amongst themselves; because every member of the corporation is bound by the jurisdiction into which he voluntarily enters; and being all freemen, their circumstances are equal."

In *City Council* v. *Pepper*, 1 Richardson (S. Car.) Law 364, 367 (1845), bot. p. 366, the Court say:

> "The authority given to the city court (by the legislature) to try all offenders against the city ordinances, impliedly declares, that notwithstanding the common law objection, it was right and proper to give it the power to enforce the city laws against all offenders.

That there was great reason in this, can not be doubted, when it is remembered that the interest of the corporators is so *minute* as not to be even thought of, by sheriff, juror or judge. It is very much like the interest which similar officers would feel in enforcing a state law, the sanction of which was a penalty. The sum thus to be recovered goes in exoneration of some part of the burden of government to which every citizen is subjected; but such an interest has no effect upon the mind. It is too slight to excite prejudice against a defendant. The same thing is the case here. For the judge, sheriff and jurors, are members of a corporation of many thousand members. What interest of value have they in a fine of twenty dollars?"

The common law rule as to strangers is no longer in effect in the United States because the jurisdiction of a mayor is laid down by the legislatures of the States and by those laws every person coming within the confines of a municipality is subject to its ordinances. The inflexible prohibition of the common law against an interested judge has not been altered, however, in the slightest degree, and a legislature is not competent to break down that barrier to tyranny.

There is no violation of this protection when the mayor exercises a limited and petty jurisdiction in his village in the enforcement of the municipal ordinances, and all persons coming into the village are subject to them. A far different question arises where the legislature attempts to grant the mayor wide discretion as to large fines in State cases, extending his power over territory outside the municipality and giving it one-half of the fines. The village share of fines constitutes a direct money interest which the fundamental law forbids. The vice of the law is aggravated by permitting the village share of the fines to be used partly

to pay lawyers and secret-service agents who work up the cases and become merged in the governmental machine headed by the mayor. A short analysis will make clear our point. The object of the criminal law is to prevent law-breaking by punishment of offenders. Where a fine alone is imposed, the punishment is a payment of money. The legislature may provide that parts of fines be paid to other agencies than the State, but it can not provide that part or all of the fines be paid in a way to destroy the impartiality of the courts. In the instant case, why were one-half the fines paid to the village? Opposing counsel did not answer this question here or in the State courts. The punishment would have been the same if the whole fines were paid to the State.

Fines in criminal cases are not revenue measures for the State or any of its subdivisions. In permitting the village to share in the fines the legislature created a revenue measure for the village, and the mayor thus became a revenue collector. His character as judge was thereby destroyed. The revenue accruing to the village became a direct bribe to convict and the mayor's interest was to make the fines large in order to increase the revenue. The legislature plainly intended this result to follow as a means of stimulating the activities of the mayors' court machinery. The mayors thus became money-dominated and lost their constitutional integrity. They were collecting agencies with only the shadow and mask of a court. They denied due process of law.

This moneymaking purpose is further shown by the provision in Sec. 6212-18 which gives final jurisdiction to the mayor, without a jury, and permits only proceedings in error to be prosecuted. The *size of the fines* and the weight

of the evidence can not be reviewed. Only errors of law are reviewable in error proceedings.

It would be difficult to conceive of a more cunning and ingenious scheme to use the money motive as the driving force of a judicial system and yet apparently preserve some of the outward forms of existing governmental processes. The preservation of old forms, however, is only on the surface. The heart and substance of the vicious scheme is all new and consists of seven parts.

First. The division of State case fines with the village has never been done before. This is the rotten core from which radiated the greatest evils.

Second. The sizes of the fines from one hundred to one thousand dollars for a first and three hundred to two thousand dollars for a second offense are more stringent than the fines under the National Prohibition Act, and far beyond anything known to our State law before. This large discretion was a strong appeal to cupidity. The possibility of defendants serving years in jail to work out fines at the rate of sixty cents a day gave the mayor confidence in imposing large fines and had the effect of terrorizing those convicted into frantic efforts to pay.

Third. The employment by the mayor of prosecutors and secret service agents who share in the fines and are always the seekers after business as well as witnesses in the trials is entirely new to our criminal law, and furnished the needed administrative force. It was an incentive to perjury and unfair practices to make big fees.

Fourth. There were other courts paid on a salary basis in Hamilton County and other large populated counties of the State, which could have handled prohibition cases in an orderly and constitutional manner. They were the common pleas and municipal courts. No money interest could

be attributed to them because they are judicial officers and on a salary basis; the mayors' courts were unnecessary, except that they could be more easily handled by the prohibition forces through their money interest. Their plenary powers were new.

Fifth. Opposing counsel stated that the mayors before the prohibition law had county-wide jurisdiction in State cases. We believe this to be an error. There are thirteen municipal courts in as many cities in populous counties of the State, and the mayors in outlying villages in such counties had no jurisdiction whatsoever in criminal cases in the cities. This restriction is contained in each separate act creating the municipal courts. As to Cincinnati, Sec. 1558-41 provides that no village mayor should have jurisdiction in State offenses in Cincinnati.

> Sec. 1558-41. "No * * * mayor of any village * * * in any proceeding, whether civil or criminal, in which any * * * warrant, order of arrest * * * shall have been served upon a citizen or resident of Cincinnati * * * shall have jurisdiction * * * unless the offense * * * shall be alleged to have been committed within said * * * village."
> Passed April 17, 1913—103 O. L. 290.

But the Ohio prohibition law, Sec. 6212-18, destroyed this restriction and gave jurisdiction to the villages in *liquor cases* arising in Cincinnati.

> Sec. 6212-18. "Any * * * mayor * * * within the county with whom the affidavit is filed charging a violation of any of the provisions of this act (G. C. 6212-13 to 6212-20), when the offense is alleged to have been committed in the county in which such mayor * * * may be sitting, shall have final jurisdiction

to try such cases upon such affidavits without a jury, * * *."

Passed April 21, 1921—109 O. L. 144.

See *Wilkins* v. *State of Ohio,* 23 Ohio Nisi Prius (n. s.) 293.

This was entirely new and was the source of the greatest money-making element of the small villages in populous counties. Through the favor of above section North College Hill increased its field of operation many hundred fold and Milford many thousand fold by allowing them to arrest Cincinnati citizens whom they were forbidden to arrest before.

Sixth. We have not here the situation explained in *City Council* v. *Pepper,* 1 Richardson (S. Car.) Law 366, 367, where the small fine in ordinance cases and the larger fines in State cases would not affect the mayors or judges minds by reason of their *minuteness* in comparison with the large population. In the small villages the extent of the business to be expected, undoubtedly in the contemplation of the legislature at the passage of the law, was a weighty consideration which could not fail to influence the mind of the mayor as judge to decide against defendants. The money taken in by the courts added greatly to the material prosperity of the villages.

Seventh. A corollary to the preceding six legislative innovations is the fact that the mayor was elected in his village and outside of it had no political responsibility. All he did in these courts was for the benefit of the village; he had no accountability to the outside population from whom he drew his revenue. The urge upon him was to make as much money as he could from the non-residents.

On above facts we cite as clearly in point Dr. Bonham's case 8 Coke 114a, 118a (1610); *Day* v. *Savage,* Hobart

87 (1615); *London* v. *Wood,* 12 Mod. 669, 687, 688 (1701). These great English cases are still of recognized authority in the United States and were referred to with admiration in Kent's Commentaries, Vol. I, p. 494, 7th Ed. A more modern English case cited often in the United States is *Dimes* v. *Grand Junction Canal,* 3 H. L. 759 (1852), where there is a long and valuable discussion on the disqualification of a judge through interest. Two pertinent American cases on representative interest in a judge are *Nettleton's Appeal,* 28 Conn. 267 (1859), and *State* v. *Young,* 31 Fla. 594, 19 L. R. A. 636 (1893). An Ohio case arising under statutes creating a quasi judicial system similar in the main to ours and persuasive in its authorities and reasoning is *Meyers* v. *Shields,* 61 Fed. 713, 725. Also in point are the cases cited in our main brief, pp. 18, 19, 20, 21.

These seven new phases of the prohibition law explain clearly how the creation and running of the village liquor courts inevitably saturated them with money influences. The receipt by the mayor of his fees, only in the event of conviction, is unconstitutional and affords a personal and substantial interest to him, in addition to his cogent representative interest as executive and political head of the village. Zeal for organized law enforcement against the citizen can not justify degradation of any of our courts, high or low. The laws under attack concern prohibition, but this is only incidental. Our interest is to sustain the purity of all judicial processes for all future time. Organization of courts equipped by the legislature with summary powers over property and liberty, but bound together by the principle of profits to all concerned in their operation, is condemned by the fundamental maxims of our oldest juristic concepts. It goes back to the roots of English liber-

ties under Magna Charta, which guaranteed that the king *should not sell justice.* "Nulli vendimus justitiam."

Ohio Law Making Compensation of Mayor Dependent upon the Contingency of the Mayor Finding the Defendant Guilty, Changes the Common Law and "Disregards Those Fundamental Principles * * * Which Have Relation to Process of Law and Protect the Citizen in His Private Right and Guard Him Against the Arbitrary Action of Government."

By statute of 12 Ric. II, Chap. 10 (1388), it was provided that justices of the peace be paid a per diem wage. The statute is as follows:

ANNO DUODECIMO RICHARDI II.

CAP. X.

HOW MANY JUSTICES OF PEACE THERE SHALL BE IN EVERY COUNTY, AND HOW OFTEN THEY SHALL KEEP THEIR SESSIONS.

Item, it is ordained and agreed, That in every commission of the justices of peace, there shall be assigned but six justices, with the justices of assises, (2) and that the said six justices shall keep their sessions in every quarter of the year at the least, and by three days, if need be, upon pain to be punished according to the discretion of the King's council, at the suit of every man that will complain; (3) and they shall enquire diligently, amongst other things touching their offices, if the said mayors, bailiffs, stewards, constables, and gaolers have duly done execution of the said ordinances of servants and labourers, beggars and vagabonds, and shall punish them that be punishable by the said pain of an hundred shillings, by the same pain; and they that be found in default, and which be not punishable by the same pain, shall be punished by their discretion. (4) And every of the

said justices shall take for their wages four shillings the day for the time of their said sessions, and their clerk two shillings, of the fines and amerciaments rising and coming of the same sessions, by the hands of the sheriffs. (5) And that the lords of franchises shall be contributory to the said wages, after the rate of their part of fines and amerciaments aforesaid. (6) And that no stewart of any lord be assigned in any of the said commissions. (7) And that no association shall be made to the justices of the peace after their first commission. (8) And it is not the intent of this statute, that the justices of the one bench or of the other, nor the serjeants of the law, in case that they shall be named in the said commission, shall be bound by force of this statute to hold the said sessions four times in the year, as the other commissioners, the which be continually dwelling in the country, but that they shall do it when they may best attend it.

This statute continued in force until 1855, when is was repealed by the Criminal Justice Act (18 and 19 Victoria, Chap. 126), and justices of the peace in England do not now receive any salaries unless they are entitled to them by virtue of holding other offices. The various police magistrates in England today receive salaries. See Halsbury's Laws of England, Vol. XIX, p. 550, Sec. 1152. Id. 546, Sec. 1141; 558, Sec. 1145; 544, Sec. 1138.

The English Act of Settlement, 1701 (12 and 13 William III), provided that the salaries of judges shall "be ascertained and established," and by 1 Geo. III were absolutely secured to them during the continuance of their commissions. See Kent's Commentaries, 7th Ed., Vol. I, p. 314.

The judges in England and various officers of the courts, prior to the separation of the Colonies from the mother country and after, in addition to their salaries were

entitled by law to various fees (see Reports of the Commissioners appointed by the crown on the address of Parliament for examining into the Duties, Salaries and Emoluments of the Officers, Clerks and Ministers of the several courts of justice. April 9, 1816; Jan. 5, 1818; July 3, 1819; Feb. 9, 1822. Printed by order of the House of Commons), but in no event did their payment depend upon the judge finding the defendant guilty. This was true in spite of the fact that at common law there was no such thing as costs in the sense in which we understand the term today.

> "At common law indeed as it is a general principle that the King neither pays nor receives costs, and as an indictment though by an individual is always considered his suit, no costs are payable whatever may be the event of the prosecution, and therefore, even in cases where the costs are afterwards allowed throughout the whole of the proceedings, the prosecutor must defray his own expenses." Chitty's Criminal Law, 4th Am. Ed., 1841, Vol. I, p. 824; Archbold's Criminal Practice and Pleading, 7th Ed., Vol. I, p. 690.

Some fees were collectible from the defendants, even though they were found acquitted. This continued in many cases until 1774.

> "In favor of prisoners also who are acquitted on an indictment for any crime it is enacted by the 14 Geo. III, Chap. 20, that when they who are found not guilty, or the grand jury throw out the bill, or they are entitled to their discharge for want of prosecution, they shall be immediately set at liberty without paying fees to any officers, and such fees as have been usually paid in respect of such charge, not exceeding 13 shillings and 4 pence for each prisoner, shall on certificate of a judge or justice before whom such

prisoner has been discharged, be paid out of a general county rate." Chitty's Criminal Law, Ibid, p. 829.

Thus it is seen that at common law neither the fees of the judges nor of the officers of the court depended upon the defendants being found guilty, for in either event they would be paid by the government, the prosecutor or the defendants. In Ohio a justice may not demand that an officer, filing an affidavit before him, become personally responsible for the costs or give security therefor. See General Code of Ohio, Sec. 13499.

Since the defendant is only liable for the costs in case he is found guilty, the result is that a bribe is necessarily held out before the mayor, as in this case, to find the defendant guilty.

Holding Out a Bribe to the Mayor to Find Defendant Guilty is a Denial of a Fundamental Right.

In reading the reports of common law cases and the works of common law writers, one can not help but realize that any kind of a money interest in a judge in his decision was abhorrent to the common law sense of justice.

In 3 Coke's Institutes 147, we find "It was petitioned in Parliament that the statutes whereby the justice of one bench or another should take no reward, n e be of any man's fee may be observed. The King's answer was 'The King hath and will charge such justices to minister right and will punish the contrary, and therefore willeth that all statutes made touching them and the barons of the exchequer be made void.' * * * *Though the bribe be small, yet the fault is great.*"

In Chapter 40 of the Magna Charta, we find "Nulli vendimus nulli negabimus, aut differamus, rectum aut jus-

ticiam." (To no one will we sell, to no one will we refuse or delay right or justice.) McKechnie (1914), p. 398.

In *Twining* v. *New Jersey*, 211 U. S. 78, 100, this Court in discussing due process, said:

> "There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American Courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land' contained in that Chapter of Magna Charta, which provides that 'no freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in any wise destroyed; nor shall we go upon him, or send upon him, but by the lawful judgment of his peers or by the law of the land.' (Citing cases.) From the construction of the meaning of the words in the light of their historical origin this court has drawn the following conclusions:
>
> First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. * * * Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. * * * Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of govern-

> ment. * * * It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard."

Measuring the Ohio laws now attacked by these principles, we submit that the defendant has been denied due process of law. In opposing counsel's brief, at pages 10 and 11, several cases are cited for the proposition that the fact that statutory compensation of the mayor is a fee to be paid only if the mayor finds the defendant guilty, does not render him interested.

It should be noted that in not one of the cases cited was raised the question of denial of due process of law, in violation of either State or Federal Constitutions.

In *Ex parte Guerrero*, 69 Cal. 188, the question arose on an affidavit of bias and prejudice, setting out among other things that the mayor's salary came from a fund made up of fees. It was held that the mayor was not biased or prejudiced.

In *Bennett* v. *State*, 4 Texas Appeals 472, the Court held the practice constitutional under a provision of the state constitution which provided that the judge "shall receive as compensation for his services such fees and perquisites as may be prescribed by law."

Wellmaker v. *Terrill*, 60 S. E. 464, 3 Ga. App. 791, was decided on statutory interpretation, and *Pace* v. *City of Hazelhurst*, 70 S. E. 967, 9 Ga. App. 203, followed this without discussion.

It would seem therefore that no court has held that allowing a judge's compensation to be dependent upon his finding a defendant guilty, constitutes due process of law.

In a work published in 1898 by Thomas K. Urdahl, en-

titled "The Fee System," reprinted from the Wisconsin Academy of Science, Arts and Letters, Vol. XII, Madison, Wis., 1898, the following words are used in reference to a fee system as compensation for judges, (At page 218) * * * "The system becomes in its essence in many cases a legalized method of bribery. The whole administration of justice is perverted in that large class of cases in which the humbler classes of the community are most likely to be affected. Such a system would not be tolerated in the higher courts, while here it is continued year after year without protest, because the cases affected as a rule are petty and insignificant in regard to the amount involved." How much more applicable are these words to the situation presented by the instant case, where even any payment of the fees depends upon the mayor finding the defendant guilty and where the amount involved is not insignificant. *It should also be noted at this point that while a mayor can not imprison except for non-payment of the fines, convictions before him become a basis for prison sentence on a third offense, of from one to five years, and for subsequent offenses of from two to ten years.* General Code of Ohio, Sec. 6212-17.

During the argument we cited cases not in our prior briefs, illustrative of the proposition that where a governmental agency is created and endowed with such duties that in their exercise the agency is put in an inconsistent governmental position, a position analogous to double agency, due process of law is denied an individual tried by such an agency or tribunal. The reference to these cases and extracts from the opinions are as follows:

Interstate Commerce Com. v. *Brimson*, 154 U. S. 447, 485.

> "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that can not be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by fine or imprisonment. * * * [Except in instances enumerated in Constitution and exercise by either house of power to punish for contempt], the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted under the law of the land by a competent judicial tribunal having jurisdiction in the premises."

In re Sims, 54 Kansas 1, 37 Pac. 135. In this case the Legislature of Kansas conferred upon prosecuting attorneys, when informed of liquor violations, power to subpoena witnesses and punish them for contempt. It was contended that this statute violated the State Constitution and also denied due process of law. The Court said in part:

> "No case has been sustained, however, where the new duties conferred upon an officer were incompatible with those already imposed by such office. * * * It is not within the power of the Legislature to make a judge an arbiter in his own cause; and to give an attorney for one of two adverse parties the power to determine the controversy is wholly inconsistent with our system of jurisprudence."

Whitcomb's case, 120 Mass. 118. A Massachusetts statute conferred upon the Common Council of Boston power to punish for contempt. It was held that this was a violation

of the 12th Article of the Massachusetts Declaration of Right, which provided that "no person shall be arrested, imprisoned or deprived of property * * * except by the law of the land."

In *Interstate Commerce Com.* v. *Brimson*, supra, it was stated that Congress could not confer judicial power upon the Commission, that is, power to itself punish for contempt. If it is not a denial of due process to confer upon the executive officer involved in the instant case judicial power outside his municipality, where his duties and interests as mayor are necessarily inconsistent with his duties as a judge, it is submitted that the principle stated in *Interstate Commerce Commission* v. *Brimson* is endangered. The apparent exception to governmental double agency in the case of exercise of judicial powers by mayors *within their own municipalities* is explained in the references printed on pages 2 and 3 of this brief. The exception should not be extended.

The question was asked at the hearing as to whether there is any statutory limit to the time which a defendant must serve in prison in default of paying his fine. There is no limit other than the working out of the fine at the rate prescribed by statute. (This has now been raised to $1.50 a day.) Under General Code 6212-17 no part of the fine may be remitted or suspended. Under General Code 12382, as amended March 26, 1925, Ohio Laws 111, p. 388, the County Commissioners may put on probation a prisoner in jail because of default in payment of his fine, *only upon the recommendation of the court* which tried the case, in this instance, the *financially interested mayor*.

The Statutes of the Various States Show a General Policy to Pay Minor Courts Fees in the Event of the Acquittal of Defendant; Five States Are the Other Way, One State Provides that Prosecutor Pays Costs if Prosecution Malicious or Without Probable Cause, Forty-one States Provide that where Defendant is Acquitted the State or County Pays the Fees of Minor Courts; Pennsylvania Doubtful.

In addition to our own investigation as to the law of all the states, we wrote to each of the Attorneys-General of the forty-eight states, asking for a reference to the laws in their several jurisdictions on the point in question. We received 39 replies, either by telegram or letter, and these we have checked up with what we have found. In some instances we were unable to verify the law as given by the attorney-general. We are sending to the Clerk the originals of all of these communications, for possible reference by the Court or opposing counsel. In the States of Arkansas, Kentucky, Nebraska, North Carolina, Ohio and Texas the law seems to be that conviction is necessary before the minor court receives any fees; the Assistant Attorney-General of Nebraska writes: "This leaves a regretable situation which might possibly affect a justice of the peace in rendering his decision." (See letter of Assistant Attorney-General filed with Clerk.) In the State of North Carolina the minor courts receive fees only in case of conviction, but there are provisions that the prosecutor must pay costs where the complaint is malicious or without probable cause. In forty-one states, so far as we have been able to determine, the minor courts are paid for their services by the state or county, regardless of acquittal or conviction, except that in Virginia the minor courts receive one-

half the usual fees where there is acquittal. Four states have in effect embodied state pay in case of acquittal in their constitutions—California, Florida, Louisiana and South Carolina.

We herewith give references to the statutes and constitutions of every state in the Union on this subject. All the states which have the two minor jurisdictions of justices of the peace and mayors provide that the same fees for state cases shall be charged by both courts. We give only the substance of the laws unless quotation marks are used.

ALABAMA. Criminal Code of Alabama, 1923.

Sec. 3850. Justices of the peace may deduct from fines and forfeitures in other cases his fees where defendant guilty or insolvent and unable to pay after conviction, not to exceed fifty dollars per month.

ARIZONA. Revised Statutes of Arizona, 1913.

Attorney-General reports minor courts paid salaries.

ARKANSAS. Digest of Statutes, Crawford & Moses, 1921.

Under title Criminal Procedure, Sec. 3243 provides that in case of failure by defendants to pay costs on conviction, they should be paid by county.

Attorney-General reports magistrates receive fees only in case of conviction.

CALIFORNIA. Kerr's Penal Code of California, 1920.

Constitution, Sec. 15, Art. 6. Judicial officers forbidden to receive fees to their own use.

See letter of Attorney-General.

COLORADO. Compiled Laws of Colorado, 1921.

Sec. 7890. In all criminal trials justices of the peace shall tax costs and collect from parties liable, provided that the sum paid justices of the peace in all counties out of the county treasury shall not exceed sixty dollars in any month.

Sec. 6593. When defendant acquitted, costs shall be paid by county.

CONNECTICUT. General Statutes of Connecticut, 1918.

Sec. 6681. If defendant acquitted before justice of the peace the town in which prosecution is had shall pay costs.

DELAWARE. Revised Code of Delaware, 1915.

Sec. 3959. Justice of the peace shall in no case receive fine or cost imposed by him.

Sec. 3960. It shall not be lawful for justice of peace to collect costs from complainant or defendants for binding over.

Attorney-General reports justice of the peace receives fees from State.

FLORIDA.

Article XVI, Sec. 9 of the Constitution provides that in all state criminal cases, where defendant insolvent or discharged, State shall pay costs and expenses including fees of officers.

Sec. 6168, Florida Revised Statutes, 1920, provides counties shall pay all legal costs of justice of the peace through county commissioners.

GEORGIA. Georgia Code, 1926.

Sec. 1105. If convicted, defendant to pay costs.

Sec. 6012. Justice of the peace in cities less than 54,000 to be elected and to receive salaries.

Sec. 1115. Costs due justices where defendant acquitted to be paid out of fines and forfeitures by judge of Superior Court.

IDAHO. Idaho Compiled Statutes, 1919.

Sec. 3710. Table of costs for justice of peace.

Sec. 3866. Police judge salary $1,000 per year, same fees as justice of the peace to be paid in city treasury.

Sec. 3880. Police judge has jurisdiction of justice of peace in State misdemeanor cases.

Attorney-General reports fees are paid to minor courts whether defendant acquitted or convicted.

ILLINOIS. Illinois Revised Statutes, Smith & Hurd, 1925.

Chap. 53, Sec. 59 provides that where prosecution fails in all criminal cases before justices of the peace or police magistrates, county board shall pay costs out of county treasury.

INDIANA. Burns Annotated Statutes, 1926.

Sec. 2019. Gives table of fees of justices.

Sec. 2022. Salaries to be paid justices where townships are in cities having 45,000 to 60,000 population.

Secretary of Legislative Bureau reports justice of peace receives fees whether defendants convicted or not.

IOWA. Code of Iowa, 1924.

Sec. 10638. Costs to justice of the peace in criminal cases shall be audited and paid out of the county treasury in case prosecution fails or where the fees can not be made from person liable.

KANSAS. Revised Statutes of Kansas, 1923.

Sec. 28-150. In all criminal cases before justice of peace where fees are not paid by defendant or prosecuting witness, they shall be paid by county where prosecution instituted.

Secs. 28-127, 20-1408. Judges of minor courts paid salaries.

KENTUCKY. Carroll's Kentucky Statutes, 1922.

Sec. 1760. No officer shall be entitled to a fee in a proceeding for misdemeanor unless same is recovered and collected from defendant.

LOUISIANA. Constitution and Statutes of Louisiana, Vol. III, 1920, Wolff.

Constitution, Art. 128, p. 2275. "Justice of the peace shall receive no fees in criminal matters, nor in peace bond cases, but, in lieu thereof such salaries as may be fixed by the police jury, and paid by the parish, which salaries shall be graded."

MAINE. Revised Statutes of Maine, 1926.

Chap. 134, Sec. 23 provides that when defendant acquitted by magistrate or sentenced to pay costs and does not pay, county commissioners shall order such costs to be paid out of county treasury.

MARYLAND. Annotated Code of Maryland, Bagby, 1924, Vol. I.

P. 86, Art. 24, Sec. 7 provides that where defendant in misdemeanor cases is acquitted by jury or where taken on any warrant and no indictment, costs of prosecution shall be paid by county.

MASSACHUSETTS. General Laws of Massachusetts, 1921.

Chap. 218, Sec. 75. Provides for salaries to justices.

Chap. 219, Sec. 19. Provides that acquittal or conviction does not affect payment to justices.

MICHIGAN. Compiled Laws of Michigan, 1915.

We could not find the sections involved, but Deputy Attorney-General reports that justices of the peace and judges of minor courts are allowed fees in all criminal cases regardless of whether accused is acquitted or convicted.

MINNESOTA. General Statutes of Minnesota, 1923.

Sec. 9144. Justice may require complainant to give security for costs; if not done, dismiss complaint.

MISSISSIPPI. Laws of 1922.

Chap. 165, Sec. 1, Par. X. Justices of the peace in all state cases in which state fails in the prosecution to be paid out of the county treasury, not to exceed sixty dollars a year.

Attorney-General reports that there are not less than ten justices of the peace in each county.

MISSOURI. Revised Statutes of Missouri, 1919.

Sec. 3789. When defendant discharged or acquitted before justice of the peace, costs shall be paid by county, except when prosecution commenced by complaint and prosecuting attorney declines to file information, in which case proceedings dismissed at costs of complainant.

MONTANA. Revised Code of Montana, Choate, 1921.

Vol. I, Sec. 4926. In criminal cases justices of the peace can retain out of costs not more than $500.00 a year.

Assistant Attorney-General reports that minor magistrates and justices of the peace receive fees regardless of acquittal or conviction.

NEBRASKA. Compiled Statutes, 1922.

Sec. 10168. In misdemeanor cases magistrates shall render judgment for costs against person convicted.

Attorney-General reports magistrates lose costs unless defendant convicted, but regrets this situation.

NEVADA. Revised Laws of Nevada, 1912.

We could not find statutes bearing on situation, but Attorney-General reports justices of the peace and judges of minor courts are on a salary basis, compen-

sation paid by counties. Fees when collected are paid in county treasury and officers have no interest in them.

NEW HAMPSHIRE. Public Laws of New Hampshire, 1926.

Chap. 323, Sec. 32. All justices receive salaries, amount depending on size of town. Conviction or acquittal does not affect salaries.

Attorney-General reports conviction not necessary for magistrates to receive fees.

NEW JERSEY. Compiled Statutes of New Jersey, 1911.

We could not find the statutes on this subject, but Attorney-General reports that justices of the peace and judges of minor courts act only as committing magistrates in criminal cases; costs of these magistrates are taxed and submitted to the prosecutor of the pleas of the county, who may approve or disapprove of the same—no set rule for allowance or disallowance.

NEW MEXICO. New Mexico Statutes Annotated, 1915.

Sec. 3181. Justice of peace to pay fines and costs to county commissioners in criminal cases quarterly. We have the same situation here as in North and South Dakota, and we assume that the county pays the costs where defendant guilty.

Attorney-General reports fees paid regardless of conviction.

NEW YORK. Birdseye C. & G. Consolidated Laws of New York, 2nd Ed.

P. 1552-1553 County Law, Sec. 240. Charges and accounts for services in criminal proceedings by justice of the peace must be paid by county.

Also Town Law, P. 8837, Sec. 171. Fees of magistrates in criminal proceedings shall be a county charge.

Attorney-General reports that in all criminal matters costs must be paid by town or county in the minor courts.

NORTH CAROLINA. Consolidated Statutes, 1919.

Chap. 23, Art. 7. Minor judges not entitled to fees if defendant acquitted, but prosecutor to pay costs if court is of opinion that there is not reasonable ground for prosecution.

NORTH DAKOTA. Compiled Laws of North Dakota, 1913.

Sec. 9182. Justice of the peace must make quarterly report of doings in criminal cases to county commissioners, and another section gives fees to minor courts in criminal cases.

In *Barrett* v. *Stutsman County*, 4 N. D. 175 (1894), the court holds that since justice may charge fees and must turn them in to the county commissioners, he is entitled to his pay, even if defendant acquitted, from the commissioners.

OHIO. General Code.

Sec. 3019. Attorney-General construes this section to mean that minor courts receive no fees unless defendant convicted.

OKLAHOMA. Compiled Oklahoma Statutes, 1921.

Sec. 6435. In all cases where fees not paid in criminal cases to justices of the peace, fees allowed by law shall be paid by county; total not to exceed $100.00 per quarter.

OREGON. Oregon Laws, Olson, 1920.

Sec. 2224-49. If any prosecution, begun by a prosecuting officer, shall fail, the costs shall be paid by the county.

PENNSYLVANIA. Pennsylvania Statutes, Complete to 1920.

Constitution, Art. V, Sec. 13. All fees, including justice of the peace and other minor criminal courts, must pay fees into the county treasury.

Sec. 12. Magistrates in Philadelphia to have salaries.

Sec. 10732. Fees of justices of the peace, magistrates and aldermen are to be $2.00 in all cases of summary conviction heard and disposed of and to be paid by county; commitment of vagrant $1.00, if discharged 50 cents.

RHODE ISLAND. General Laws of Rhode Island, 1923.

Sec. 6636 provides that justices of the peace be paid costs in criminal cases by district judge.

Attorney-General reports conviction not necessary for minor courts to get fees.

SOUTH CAROLINA. Constitution of 1895.

Constitution of 1895, Sec. 20, Art. V. "Each magistrate shall receive a salary to be fixed by the General Assembly in lieu of all fees in criminal cases."

Attorney-General reports all magistrates are on a salary basis.

SOUTH DAKOTA. South Dakota Revised Code, 1919.

Sec. 5225 provides that justices of the peace must file report to county board, of costs and fines in criminal cases. We assume that the decision in *Barrett* v. *Stutsman County*, 4 N. D. 175, is applicable in this State.

Attorney-General reports fees of justices in state cases are charged against county without reference to outcome of case.

TENNESSEE. Annotated Code of Tennessee, Shannon, 1918.

Sec. 7619. State or county pays costs where there is an acquittal or dismissal of prosecution.

Sec. 7615. In case of acquittal court may order defendant's costs to be paid.

On this question of fees there are three interesting cases in Tennessee.

Prince v. *State*, 7 Humph. 137, 140;

Tucker & Oaks v. *State*, 2 Head. 555, 558;

Henley v. *State*, 14 Pickle 665, 689.

TEXAS. Revised Criminal Statutes of Texas, 1925.

Code of Criminal Procedure, Art. 1066, P. 176. Justice of peace allowed fees in case of conviction. Art. 1071, P. 177. Justice in misdemeanor cases allowed $3.00 if defendant convicted. Conviction necessary in this state before fees allowed.

UTAH. Compiled Laws, 1917.

Sec. 2528. Accounts against county for fees of the justices of the peace for services in criminal cases shall be certified as correct by county attorney, and shall be presented to auditor.

Attorney-General reports justices of the peace receive fees from county regardless of conviction.

VERMONT. General Laws of Vermont, 1917.

Sec. 616. Fines and costs imposed by justice to be paid to county clerk.

Sec. 625. Municipal and city judges must pay costs and fines into proper treasury.

Sec. 7432. Justices of the peace allowed certain fees in criminal cases.

Sec. 611. Expense of criminal proceedings before magistrates allowed to magistrates before whom they were tried.

VIRGINIA. General Laws of Virginia, 1923.

Sec. 4963. Justice shall certify to the clerk of county or corporation expenses in criminal cases and these are payable out of the treasury.

Sec. 3527. If defendant in misdemeanors is acquitted, one-half only of lawful fees shall be paid to justices by state. This section amended, but not changed in above provision.

WASHINGTON. Remington's Compiled Statutes of Washington, 1922.

Sec. 7580. Justice shall pay monthly to county treasury all fees and compensation in criminal cases.

Sec. 7582. All salaries to justices and constables to be paid every month.

West Virginia. Code of West Virginia.

Chap. 5, Sec. 229. Where defendant is acquitted, fees are audited and paid by county court from a fine fund made up of all fines collected in misdemeanor cases within the county.

Attorney-General reports fees are paid even if not collected.

Wisconsin. Wisconsin Statutes, 1925.

Sec. 307.01. Fees to be collected by justice.

Sec. 360.33. Justice may require securities for costs from complainant. If not paid may dismiss complaint.

Legislative Reference Library reports judge receives fees regardless of outcome of case.

Wyoming. Wyoming Compiled Statutes, 1920.

Sec. 6438. In all criminal cases where fees are not paid by defendant or prosecuting witness, they shall be paid by the county.

Edward P. Moulinier,
Attorney for Plaintiff in Error.

Harry H. Shafer,
James L. Magrish,
Of Counsel.

Cincinnati, Ohio, December 10, 1926.

The following opinion of Judge Struble of the Common Pleas Court of Hamilton County, Ohio, as well as the opinion of the Court of Appeals of Hamilton County, Ohio, appear in the record certified by the Supreme Court of Ohio clerk to the clerk of this court. Index of printed record gives complete list of matters certified.

25 Ohio Nisi Prius (N.S.) 580.

Exercise of Judicial Power by an Interested Judge.

Common Pleas Court of Hamilton County.

EDWARD TUMEY v. STATE OF OHIO.

Decided, October, 1925.

Liquor Courts—Mayors of Villages Disqualified from Hearing such Cases—By Reason of their Financial Interest in the Outcome—Organization of Liquor Courts under Section 6212-37.

1. The mayor of a village sitting as a court is exercising judicial power and disinterested in the event of his decision is a condition precedent to his right to exercise this power, except where his sitting is necessary to prevent a failure of justice.
2. The right to challenge a mayor of a village on the ground that he has substantial interest in the event of his decision, in the absence of statute is a right implied from the constitutional guarantee of inalienable rights and grant of remedy (trial) by due process of law.
3. The procedure whereby to challenge him in the absence of statutory procedure is to address the challenge to the mayor himself with the proof in support of the same, and if denied, his action may be reviewed by the proper court.
4. The interest that will disqualify the mayor of a village under the general law, is any substantial interest in the event of his decision.
5. When the council of a village, by proceedings under authority of Section 6212-37, organizes a force of prohibition officers under its mayor and puts him to work in enforcing prohibition co-extensive with the county, it thereby gives him such an interest in convictions in liquor cases by reason of the way he is situated, circumstanced and involved in this organization, as to disqualify him from sitting in the trial of such cases.

Harry H. Shafer, for plaintiff in error.

Allen C. Roudebush, for defendant in error.

STRUBLE, J.

This case is before the court on petition in error to reverse the judgment of Mayor Pugh of the village of North College Hill, finding the plaintiff in error guilty of the "unlawful possession of intoxicating liquors."

The plaintiff in error set forth several grounds of reversal, one of which the court will consider with some particularity, because in passing upon this ground of reversal, in its application to plaintiff's case, the court must of necessity consider and incidentally pass upon a subject-matter of serious concern to the citizenry of this state.

This subject-matter concerns the legality of the so-called commercialized enforcement of prohibition, accomplished by organizing mayors of villages, known as liquor courts, under authority of Section 6212-37, G. C. O., and using them as special instruments in enforcing prohibition coextensive with the county. The pertinent part of Section 6212-37 is as follows:

"6212-37. The council of any city or village may, by ordinance, authorize the use of any part of the funds collected for the violation of any law prohibiting the manufacture or sale of intoxicating liquors, for the purpose of hiring attorneys, detectives or secret service officers to secure the enforcement of such prohibition law."

Mayor Pugh, at the time of his conviction of plaintiff, was operating a "liquor court" for the village of North College Hill, and when he called plaintiff before him for trial, the plaintiff, by motion and otherwise, challenged Mayor Pugh's right to sit in judgment in his case on the ground that the Mayor as head of this "liquor court" was so situated and circumstanced as to render him "interested" in convictions in liquor cases; and the plaintiff says further that his case, being a liquor case, and Mayor Pugh being an "interested" judge, to be forced into a trial before him involving his liberty, was a violation of his constitutional right of having "remedy" (trial) by due process of law guaranteed him by both the Federal and State Constitutions.

Plaintiff, in support of his motion, offered in evidence a certified copy of Ordinance No. 125, duly passed by council of North College Hill on May 11, 1923, creating and establishing the liquor court. This ordinance is so illuminating

as to how these courts are created and the energizing task set to every one engaged in the work of the court, that it will be quoted in full.

ORDINANCE No. 125.

"An ordinance to provide for compensation to be paid from the secret service funds of the village of North College Hill, Hamilton County, Ohio, created by authority of Section 6212-37 of the General Code of Ohio, to detectives, secret service officers, deputy marshals' and attorneys' fees, costs, etc., for *services in securing evidence necessary to conviction* and prosecuting violation of the Law of the State of Ohio prohibiting the Liquor Traffic:

Be It Ordained, by the Council of the village of North College Hill, Hamilton County, Ohio:

Section I. That fifty percent of all moneys hereafter paid into the Treasury of said village of North College Hill, Ohio, that is one-half of the share of all fines collected and paid into and belonging to said village of North College Hill, Ohio, received from fines collected under the law of the State of Ohio, prohibiting the liquor traffic, shall constitute a separate fund to be called the Secret Service Fund to be paid for the purpose of *securing the enforcement* of any Prohibition Law.

Section II. That Deputy Marshals of the village of North College Hill, Ohio, shall receive as compensation for their services in *securing the evidence* necessary to secure the conviction of persons violating the Law of the State of Ohio, prohibiting the Liquor Traffic, an amount of money equal to 15% of the fine collected, and other fees allowed by law.

Section III. That the attorney at law of record prosecuting persons charged with violating the Law of the State of Ohio, prohibiting the Liquor Traffic, shall receive as compensation for legal services an amount equal to 10% of the fine collected, in all cases, whether the plea be guilty or not guilty.

Section IV. That detectives and secret service officers shall receive as compensation for *their services in securing* the evidence necessary to secure the conviction of persons violating the Law of the State of Ohio, prohibiting the Liquor Traffic, an amount of money equal to 15% of the fine collected.

Section V. That the Mayor of the village of North College Hill, Ohio, shall receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases.

Section VI. This Ordinance is hereby declared to be an *emergency* ordinance, necessary to the immediate preservation of the public peace and safety, made necessary by reason of the flagrant violation of the Laws of Ohio, enacted to prohibit traffic in intoxicating liquors, and shall be in effect from and after this passage."

THE LIQUOR COURTS, THEIR OFFICERS AND EARNINGS.

Council, in addition to Ordinance No. 125, by other ordinances, authorized the appointment of deputy marshals, secret service officers, attorneys, etc.; and 10% of the village's portion of the fines was to be paid to the secret service fund to pay chemists, stenographers, transportation and other incidental expenses essential to the organization and operation of this "liquor court."

There was proof also of the earnings of this "liquor court" to the 31st day of December, 1923, the total amount collected from the fines was $20,000, from which the State received $8,992.50; North College Hill received $4,471.25; of which sum $2,697.25 was placed to the credit of the village safety fund, and the balance in the secret service fund. Earl Boehm, acting as prosecutor in the liquor court, received $1,796.50; the deputy marshals, inspectors and other employees received $2,697.75, and $438.50 was paid for costs in transporting prisoners, serving writs and other services in connection with the trial of these cases, and Mayor Pugh received $696.35 in fees.

The proof showed that since December 31, 1923, this "liquor court" had earned large sums of money in fines in liquor cases which had been distributed in the same proportion as prior to December 31, 1923.

It was admitted that Mayor Pugh was at the time, a taxpayer in the village of North College Hill, and at the time of the resignation of Mayor Vogelpohl, his predecessor, on account of his disinclination to operate a liquor court, in the public agitation that followed Vogelpohl's resignation as to whether or not the court should be continued as an enterprise of the village, Mayor Pugh in public speeches advocated the continuance of this liquor court because of the "financial" benefit to the village. Mayor Pugh was appointed as the successor of Mayor Vogelpohl.

One of the witnesses offered was Harry Zimmerman, a deputy marshal, and as his testimony is rather illuminating as to how these liquor courts are operated, a portion of it will be quoted, as follows:

"Q. What is your name?

A. Harry Zimmerman.

Q. What is your business with the village of North College Hill?

A. Deputy marshal.

* * * * * *

Q. How long have you been a liquor agent?

A. Oh, about eight weeks, I guess.

Q. What did you do before you were a liquor agent?

A. I worked in the city,—New York City.

Q. How long have you been in Cincinnati?

A. * * * About ten weeks.

Q. How did you come to get on the prohibition squad?

A. Mr. Pugh, the mayor here, I was talking to him one day, and at the time I was working in Montgomery, out of the court there, and I was talking to the mayor here one day and he asked me if I would care to come here and work for him, and I told him I would.

Q. You worked in the Montgomery liquor court for about how long?

A. About a week.

Q. How did you come to get a job out there?

A. Through the Anti-Saloon League in Cincinnati.

Q. Are you a prohibition worker; that is, you are part of the prohibition forces, are you?

A. Of North College Hill, I am, yes, sir.

Q. But not otherwise?

A. How do you mean, not otherwise?

Q. I mean you do not work in the Anti-Saloon League, is that what you say?

A. I don't make it a business, but I help them if I can; if I get the opportunity.

Q. You make it a business of being a prohibition officer?

A. Yes, sir.

Q. What salary do you get as a prohibition officer?

A. Fifteen per cent.

Q. Fifteen per cent. of what?

A. Of the fines from this village."

Mayor Pugh overruled plaintiff's motion and challenge of his right to sit in judgment in his case, and proceeding with the trial, found plaintiff guilty, imposed a fine, and the plaintiff is here on petition in error, protesting that he was forced to trial before an "interested" judge.

The plaintiff in error is invoking, as his protection from a trial by Mayor Pugh, the fundamental principle of judicial authority so well expressed in the maxim:

"No judge shall decide a case in which he has a direct, immediate, substantial interest."

In a general consideration as to whether or not this fundamental principle of law is applicable to plaintiff's situation in this case, the several claims of counsel for the state will be fully treated without special consideration.

Mayors of Villages—How Challenged.

Mayors of villages functioning as judges have been left free of statutory grounds of disqualification,—they can not

by authority of any statute be "sworn off the bench," and the question is by what right, if any, can they be challenged.

Nor are there any express provisions of the Ohio Constitution for disqualifying any of the judges of the State. There are, however, statutory grounds of disqualifying judges of the state, except mayors of villages, and possibly justices of the peace.

Mayors' courts in the villages have been held to be inferior courts of record. (96 O. S., 205.)

It will be seen from the foregoing that mayors of villages are in a unique situation in the judicial system of this state.

The precise question was before the Supreme Court of this state (70 O. S., 124), but was passed with the remark:

"*The affidavit of prejudice.* This proposition of error is based on Section 550 Revised Statutes. This section applies to the judges of the Court of Common Pleas. It has no application whatever to mayors; nor is there, so far as we are aware, any provision of like character which affects mayors. The affidavit of prejudice was properly ignored."

This pronouncement is all right as far as it goes, that the section of R. S. under consideration applied to the judges of the Common Pleas Court and not to mayors; but the serious question left undecided is, can mayors of villages merely because they have been left free of statutory grounds of disqualification, "properly ignore" justifiable challenges of their right to sit as judges?

If it be held that mayors of villages functioning as judges are in this impregnable position in the judicial system of this state, then the other judges of the state can be placed in the same impregnable position by the General Assembly merely repealing the statutory grounds of disqualifying them. To so hold would be to place the power in the Legislature by action, or mere inaction, to subject the citizenry of this state to trials involving their inalienable rights, by judges "interested" in the event of their decisions.

The conclusion is inevitable that the right to disqualify judges in the absence of statute from sitting in trials in which they have a substantial interest in the event of their decisions, is a right implied from the following guarantees of the Ohio Bill of Rights, Article I, Section 1:

"All men are by nature free and independent, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

And Article I, Section 16:

"All courts shall be open and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due process of law, and shall have justice administered without denial or delay."

Mayor Pugh was functioning in plaintiff's trial as a judge of an inferior court of record and exercising judicial power.

Plaintiff's inalienable rights were involved in his trial and disinterest of Mayor Pugh in the event of his decision in plaintiff's case, was essential to plaintiff's right of trial by "due process of law."

By Article 4, Section 1 of the Ohio Constitution, the judicial power of the state is vested in the courts named in the Constitution and courts inferior to Courts of Appeal that may from time to time be created by the Legislature.

There was left to the Legislature only the apportionment and distribution of the judicial power of the state to the courts, except as to the distribution made in the Constitution itself.

The framers of the Constitution understood what was meant by the judicial power of the state in the general law of the land at the time of the adoption of the Constitution, and the conditions attending its exercise, one of which was that only judges disinterested in the event of their decisions had any right to exercise judicial power.

By vesting the judicial power of the state in the courts without qualification, the people thereby preserved this principle of judicial authority as it was then understood in the general law of the land as much as if they had done so by express provisions of the Constitution.

It is not within the province of the Legislature by its enactments or failure of enactments, nor of the courts by their decisions, to give the words "judicial power" any other meaning, nor to alter the conditions of its exercise. The vesting of the judicial power of the state in the courts was an act of the people and changes, if any, must be made by the people and not by the Legislature nor by the courts.

Indeed there are authorative decisions expressing a doubt as to the power of the people of a state in the framing of their constitutions, to abolish this fundamental principle of judicial authority, since the adoption of the 14th Article of the Amendments to the Federal Constitution which denies to the states the right to deprive a person of life, liberty and property without due process of law. *Matter of Leefe,* 2 Barb. Ch., 39.

However this may be, under a constitution such as we have in Ohio where the judicial power is vested in the courts without qualification, there can be no question that the Legislature is without the power to set aside this maxim of the common law, and by action or mere inaction, permit one to act judicially when interested in the controversy.

Cooley, in his Constitutional Limitations, 7th Edition, pages 592 and 594, in discussing the subject, says that outside of certain cases where a judge must act from necessity, and where the interest is "trifling and insignificant,"

"We do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the state, when framing their constitution, may possibly establish so great an anomaly, if they see fit; but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we can not understand it to be authorized, in the

execution of this trust, to do what has never been recognized as being within the province of the judicial authority."

Quoting further from this eminent author:

"Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party.

"Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do; but that is the extent of his power."

In the absence of statutory procedure whereby to challenge an interested mayor acting as a judge, it is proper to make the challenge direct to the mayor himself, as was done by the plaintiff in this case, and if denied by him, incorporate the proof indicating his interest in a bill of exceptions and bring the matter before a proper court for review by a petition in error, as was done by the plaintiff in this case.

Character of Interest Disqualifying a Judge.

It has been held in this state (37 O. S., 153), that it is a pecuniary interest only that will disqualify a judge, and further that the dependency of his court costs on the event of his decision is not such a "pecuniary interest" as will disqualify a judge.

Mayor Pugh has only his court costs depending on his decision in these liquor cases,—he does not participate in

the "split" of the fines so far as the proof in the pending case shows.

Counsel for the state claims that admitting that there is the right to challenge Mayor Pugh under the implied powers in the Constitution, nevertheless, Mayor Pugh is not subject to challenge because the only pecuniary interest he has in the plaintiff's case is his court costs.

The facts which plaintiff claims constitute Mayor Pugh's disqualifying interest in his case, will be considered under an appropriate heading. It is sufficient here to say that plaintiff's point is that it is the way Mayor Pugh is involved in this organization in the village of North College Hill that constitutes his disqualifying interest in his decisions in liquor cases. One of the circumstances is the large sums of money he is making from court costs in liquor cases as distinguished from the very minor monetary interest by way of costs of judges functioning in the ordinary way where necessity of preventing a failure of justice has something to do with the courts holding that court costs are not such a pecuniary interest as will disqualify a judge.

In the case cited by counsel in support of his contention (37 O. S., 153), the court was construing interest as a statutory ground of removal of a case from the district wherein a judge was interested in the event of his decision in a case then pending before him, and held that the word "interest" in the sense in which it was used in the statute, meant a "pecuniary interest."

In the pending case, however, we are not considering interest as a statutory ground of disqualification, but interest in the sense in which it is understood in the general law of the land as an incident to the exercise of judicial authority and so concretely stated in the maxim:

"No judge shall decide a case in which he has a direct, immediate, substantial interest."

The interest here is more than a merely pecuniary interest. It is any present interest that is humanly likely to, or

ordinarily does, unbalance the scales of justice and leave a party before a judge interested in the event of his decision.

The meaning of "interest" as a statutory ground of disqualification depends upon the sense in which it is used in each particular statute, but here we are considering the sense and meaning the framers of our Constitution understood it to have in the common and general law of the land as a principle of natural justice and as a condition to the exercise of judicial power.

Quoting a few excerpts from the opinions of some of the great judges of the country will indicate that there are other "interests" than mere pecuniary interests, that will disqualify judges.

In *Cotulla State Bank* v. *Herron*, 202 S. W., 797 (p. 988 Corpus Juris) the court says:

"An independent, unbiased, disinterested, fearless judiciary is one of the bulwarks of American liberty, and nothing should be suffered to exist that would cast a doubt or shadow of suspicion on its firmness and integrity."

In *Yazoo, etc., R. Co.* v. *Kirk*, 102 Miss., 41 (p. 988 C. J.) the court says:

"Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record, or developed by evidence *aliunde* the record."

Plaintiff's claim is that Mayor Pugh is so involved in this organization in the village of North College Hill, which he calls a "liquor court," as to give him an interest in convictions in liquor cases.

Plaintiff's claim involves an effort on his part to apply the fundamental principle of judicial authority heretofore discussed, to a new set of facts, for it must be remembered

that the organization of mayors of villages to specialize in the enforcement of prohibition is entirely new to the jurisprudence of this country, and wholly the creation of prohibition enforcement under the laws passed in this state for that purpose.

These organizations in villages functioning specially in the enforcement of prohibition co-extensive with the county, have been given the name "liquor courts" by a discerning public, a name particularly appropriate because they are mayors of villages organized by councils of the villages under authority of Section 6212-37, *supra,* and made to function specially in the enforcement of prohibition co-extensive with the county as distinguished from mayors of villages not organized under authority of said section, but left alone to function in the ordinary way within their own villages.

They are known too as "commercialized courts" because they are in fact village enterprises duly organized and making a business of enforcing prohibition for the money to be made for the village and all concerned in the work of these courts, out of fines and costs collected by the mayor in liquor cases. The legislative authority for having these organizations is Section 6212-37, *supra.* The right to have them was limited to the cities and villages of the state, but it is quite clear that they were to be made use of in villages only, as none have been organized in the cities. Not all of the villages have them; only those that were "induced" to organize them have them.

The favor was not extended to the state itself, nor the counties, nor the townships, but only to the villages and cities, and only for the purpose of enforcing prohibition. Without this section of the General Code, there could be no liquor courts in the state, nor could there be in any city or village without action of its council under authority of this section.

The concurrence of numerous persons is essential to the organization and successful operation of a liquor court. The mayor of a village can not himself have and operate

a liquor court,—he has jurisdiction of liquor cases, but left to himself he must stay within his village,—left alone he can do only a local or retail business within his own village. If he is to engage in the enforcement of prohibition beyond the limits of his own village, his council, by ordinance and resolution, must organize and equip him,—give him the men and the means of sending out of the village and having the cases hunted up and brought before him for trial.

It requires as much legislation and pre-discussion of the citizenry of a village to establish a liquor court as it does to build a water works or an electric light plant.

The mayor must be willing to operate it, because if he refuses to act it can not be made to go; the council must be willing to organize and equip it and to share liberally with the deputy marshals, detectives, secret service officers, "bird dogs" that do the hunting for the cases; otherwise than by this mutuality of understanding and concurrence of action, it can not be made to function successfully.

Is it not apparent that the mayor of a village who becomes a party to the mutual understandings of all the numerous persons essential to the organization and successful operation of a liquor court, has expressly or impliedly agreed to a policy of its operation and in a way pre-judged every case that is to come before him?

There are other circumstances affecting the independence and disinterestedness of the mayors operating liquor courts which are now matters of common knowledge.

It is now quite well understood that mayors' courts in villages organized under Section 6212-37, *supra,* were intended to be, and were in the beginning of prohibition enforcement, a part of the machinery of the state for the enforcement of prohibition. In the beginning the Prohibition Commissioner of Ohio, through his inspectors (card men) and unofficial help, went propogandizing and organizing these liquor courts in villages throughout the state. Through the efforts of his department a cordon of these village liquor courts was thrown around every large city in Ohio and made to function in the enforcement of prohi-

bition in these cities, wherein it was felt that the officers therein might be disinclined to enforce prohibition with the rigor thought to be essential to its initial success.

State inspectors (card men) were sent to these liquor courts to run the business, and through these inspectors the Prohibition Department of the state dominated the whole system until the unexpected happened, in the opinion of Attorney General Crabbe holding that state inspectors (card men) could not at the same time be deputy marshals of these villages.

This opinion of the Attorney General severed the official connection between the State Prohibition Department and these liquor courts, and the state inspectors, in most cases, resigned their positions with the state and held their positions as deputy marshals of these villages, and the villages ever since have been running the business on their own hook, and conducting a form of banditry under the cover of enforcing prohibition.

That an ulterior influence has been operating on the minds of the mayors of these village courts from the beginning is clearly indicated by the difference in the character of the fines imposed before Attorney General Crabbe's opinion and since. Before his opinion the fines generally were very heavy and close to the maximum, made so by the judges of these courts, to meet the views of the Prohibition Department of the state, that in these liquor cases the imposition of heavy fines was the best means of checking the infractions of the liquor law.

Since Attorney General Crabbe's opinion and the Prohibition Department of the state lost its control of these courts, there has been a very noticeable change in the character of the fines imposed by the mayors of these courts; in most cases the fines are whatever the traffic will bear without the necessity of jailing the offenders, and are almost entirely a matter of bargaining with the offenders as to what shall be paid without any pretense on the part of the judges of judicially determining the amount of fines properly to be imposed.

The power and authority given of making of mayors of villages special instruments in the enforcement of prohibition was bad enough, but considering this in connection with what has been done in other ways for prohibition enforcement, we are forced to conclude that we have a situation that seriously menaces the liberties of the people.

The most amazing thing done was to give the courts, mayors' courts included, final jurisdiction, without juries, of an entirely new class of crimes penalized with such heavy fines, thus bringing into the judicial system of this state, through the instrumentality of these liquor courts, a large measure of judicial tyranny and arbitrary power.

Since Magna Charta the English people have relied on the privilege of the writ of habeas corpus and the right of trial by jury as a means of protecting themselves against judicial tyranny, and the exercise of arbitrary power.

I wish that space would permit quoting all that that eminent jurist, Judge Ranney, has to say in his opinion in *Work* v. *State of Ohio*, 2 O. S., 302, about these bulwarks of liberty and the great solicitude of the people, that they be preserved in the fundamental law of the land as they were in the common law.

He has this to say as to the right of jury trials:

"The institution of the jury referred to in our constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect as that recognized in the great charter and its benefits secured to the free men of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty and property; the same, brought to this continent by our forefathers, and perseveringly claimed as their birthright, in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them, in the eyes of mankind, in waging the contest which resulted in inde-

pendence. Nor did their affection for it then diminish or cool.

"They made it a corner-stone in erecting the state governments; and after the adoption of the federal constitution, without a provision securing it, they did not rest satisfied until they had proposed and carried an amendment, giving to every person accused of crime in the courts of the Union, 'the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.'

"In the ordinance of July 13, 1787, which first extended civil government over the territory northwest of the river Ohio, it was made an unalterable article of compact, that 'the inhabitants of the said territory shall always be entitled to the benefit of the writ of habeas corpus, and of the trial by jury.' Upon the organization of the state government in 1802, provisions, substantially the same as those in the present constitution, were inserted in the bill of rights. It thus appears that persons accused of crime have, for every moment of time since civil government existed within the territory of this state, by fundamental laws, been secured in the right of trial by jury. An institution that has so long stood the trying tests of time and experience, that has so long been guarded with scrupulous care, and commanded the admiration of so many of the wise and good, justly demands our jealous scrutiny when innovations are attempted to be made upon it."

Prohibition offenses under the Ohio laws were taken bodily from the Volstead law with this difference: under the Volstead law imprisonment is a part of the penalty and hence the accused are given jury trials in the Federal courts; while in Ohio the same offenses are penalized with a fine only, thus denying the accused jury trials. We have here an interesting contrast in the classification of identically the same crimes.

The purpose in Ohio was to evade jury trials and to give the courts greater freedom of action, especially mayors of

villages who were to be made to fit into the machinery of the state for the enforcement of prohibition. In *Cochran* v. *State,* 105 O. S., 541, our Supreme Court sustained the constitutionality of what was done for the enforcement of prohibition. In the *Cochran case* the court quoted with approval the language of Judge Wanamaker in 102 O. S., 65, wherein he states the law to be as follows:

"Where the penalty imposed by criminal statute is merely a fine, the right of trial by jury as guaranteed by the constitution does not apply."

The guarantees as to jury trials are contained in the 5th and 10th sections of Article 1, Bill of Rights of the Ohio Constitution. The 5th section is as follows:

"The right of trial by jury shall be inviolate."

Section 10 in part is as follows:

"Except in cases of impeachment * * * and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury."

and so on describing the form of trial which includes an "impartial jury of the county in which the offense is alleged to have been committed."

The common-law classification of criminal offenses as felonies and misdemeanors has been followed in Ohio.

By statute in Ohio, "offenses which may be punished by death or imprisonment in the penitentiary are felonies; all other offenses are misdemeanors."

Thinking in the language of Section 10, *supra,* "offenses for which the penalty provided is less than imprisonment in the penitentiary, are misdemeanors," and, "offenses for which the penalties are death or imprisonment in the penitentiary are felonies."

It will be noted that the form of trial for a felony is fixed in Section 10, *supra,* but as to the form of trial for one accused of misdemeanors, the Constitution is silent; hence the form of trial for misdemeanors is left entirely to the Legislature, except that it has been held that the constitutional guarantee that "the right of trial by jury shall be held to be inviolate," requires the inclusion of a jury in the form of trial for misdemeanors where imprisonment is a part or whole of the penalty.

So, the General Assembly penalized prohibition offenses with a fine only, thus evading jury trials and giving the courts summary power of disposing of liquor cases, and yet by the indirect means of heavy fines, the offenders can be punished more severely than if they were convicted of any of the other misdemeanors, or any of the felonies except a few of the most heinous.

Let us get before us the "fines only" that can be imposed for violation of the prohibition laws. Section 6212-15 G. C. of O. makes it a crime to "manufacture, sell, barter, transport, import, export, deliver, furnish, receive, give away, prescribe, possess, solicit or advertise any intoxicating liquors, etc."

Section 6212-17 provides in part as follows:

"Any person who violates the provisions of this act, for a first offense shall be fined not less than $100.00, nor more than $1000.00; for a second offense, not less than $200.00 nor more than $2000.00."

One who goes on a perambulating spree on New Year's eve, is likely to commit so many prohibition offenses that he could be sent to jail for a generation in default of paying the fines a liquor court has the power under these sections to inflict him with. Some of the violations could, by a slight manipulation, be framed as second offenses.

It takes over nine years to work out a fine of $2000.00 in jail at sixty cents a day, which can be imposed for a second offense.

The average time, I am informed, that those convicted of second degree murder stay in the penitentiary is, approximately, eight and a half years.

If there is a default in the payment of a fine or securing its payment, there is nothing to be done in these liquor cases but to work it out in jail, as the courts have no right to remit the fines or suspend the sentence. Section 6212-17. Nor is there anything that can be allowed for good behavior; nor can there be a pardon except from the Governor. Wholly as a result of this form of prohibition enforcement, there is a situation in the jails of this state that calls for executive clemency,—and that is of the men in jail working out heavy fines at sixty cents a day that will take years,—fines imposed by interested and dominated mayors of these liquor courts, before Attorney General Crabbe rendered his opinion terminating their official connection with the prohibition department of the state.

Petty Criminal Offenses.

There was a class of criminal offenses under the English law at the time and prior to the adoption of the Federal constitution, that were tried summarily by the courts without the intervention of a jury. In the trial of all other criminal offenses the accused was entitled to a jury trial; and it was the purpose of the framers of the Ohio, as well as the Federal constitution, to preserve for the people in these instruments the right of jury trial as it was under the common law.

Judge McIlvaine, in his opinion in *Inwood* v. *The State*, 42 O. S., 187, says:

"The provisions of the Constitution relied on as nullifying the statute, are Sections 2 and 10, Article 1. The former provides, 'the right of trial by jury shall be inviolate.' It is settled beyond further discussion that this clause in the Constitution was not intended to enlarge or modify the right of trial by jury. Its sole purpose was to guarantee the perpetuity of the institution as it then ex-

isted and as it had long existed at common law. (*Work* v. *State*, 2 O. S., 296.)

Now what were the criminal offenses tried by the court only under the common law?

Justice Brewer in his opinion in *Schick* v. *U. S.*, 195 U. S. 65, speaks of this class of cases as "petty criminal offenses.' Justice Brewer in this case had occasion to construe the provision of the Federal constitution providing that "the trial of all crimes except in the cases of impeachment shall be by jury"; and he has this to say:

"It is obvious that the intent was to exclude from the constitutional requirements of a jury the trial of petty criminal offenses."

"Petty criminal offenses" could be proceeded against summarily under the English law and the framers of the Federal constitution intended to give our people only what the English people had under the common law, so, these offenses were not included in the constitutional requirement of jury trial, *Callam* v. *Wilson*, 127 U. S., 540.

"Petty criminal offenses" were not "crimes" in the sense in which the word was understood under the common law and by the framers of the Federal and Ohio constitutions, and it is to the common law we must look for legal definitions and judicial ideas in interpreting these instruments.

Quoting from the opinion of Justice Brewer in *Schick* v. *U. S.*, *supra*, on Blackstone's definition of crimes:

"In the light of this definition we can appreciate the action of the convention which framed the constitution. In the draft of that instrument, as reported by the committee of five, the language was 'the trial of all criminal offenses * * * shall be by jury,' but by unanimous vote it was amended so as to read 'the trial of all crimes.' The significance of this change can not be misunderstood.

If the language had remained 'criminal offenses,' it might have been contended that it meant all offenses of a criminal nature, petty as well as serious, but when the change was made from 'criminal offenses' to 'crimes' and made in the light of a popular understanding of the meaning of the word 'crimes' as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirements of a jury the trial of petty criminal offenses."

"Petty criminal offenses" are spoken of by text writers, judges and others as "minor offenses, inferior offenses," and in *Markel* v. *Akron*, 14 O., 587, the court designates them as "*quasi* criminal offenses."

"It is true, for offenses *strictly criminal and infamous*, punishment can only be inflicted through the medium of an indictment or presentment of the grand jury. Constitution of Ohio, Art. 8, Sec. 10, there are, however, many offenses made so by statute, which are but *quasi* criminal, and where the legislature may direct a mode of redress, untrammeled by this constitutional provision. Such as Sabbath breaking, selling spiritous liquors on Sunday, and the disturbance of religious meetings, with many others. Swan's Stat., 255-256. Long acquiescence in these enactments goes far to show the construction which has been placed by all on the constitution, and that there may be many offenses though decidedly immoral and mischievous in their tendencies, that are not crimes, but at most only *quasi* criminal."

Under the English law at the time of the adoption of the Federal constitution, this class of criminal offenses was penalized by petty fines only.

Blackstone has this to say as to this class of cases:

"Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers *petty pecuniary mulcts*, and corporal penalties by act of parliament for many disorderly offenses; such as common swearing,

drunkenness, vagrancy, idleness and a vast variety of others, for which I must refer the student to the justice books formerly cited, and which used to be formerly punished by the verdict of a jury in the court-leet." Cooley's Blackstone, Book 4, p. 448. Star, p. 281.

The general rule of common law was that "fines were to be limited to the circumstances and personal estate of the person to be fined." Cooley's Blackstone, Book 4, Chap. 29, No. 379.

In the application of this rule if a person was ever sent to jail in default of payment of a fine, it would be due entirely to wilfulness on his part.

It was not only the petty nature of the offenses, but the petty nature of the penalties, viz., insignificant fines only that by the policy of the common law were imposed for such offenses that actuated the framers of the constitution in excluding petty criminal offenses from jury trials and constitutional procedure.

The very general practice in this country and in this state where offenses are punished with fines only, has been heretofore to make the fines of a mild character indicating a common understanding that such was the intention of the framers of the constitution. It would seem that the intention of the framers of the constitution by the inhibition against "inflicting of cruel and unusual punishments" and imposing "excessive fines" was to restrict the use by the legislature of this form of penalizing crimes; otherwise it would seem that such offenses would have been included in the guarantees as to jury trials.

This constitutional inhibition is an admonition to the legislature as well as to the courts.

The words "excessive fines" and "cruel and unusual punishments" were taken from the English Bill of Rights and put in our own constitution by the framers thereof that our people may be similarly protected. Jones' Blackstone, Book 4, Section 427, p. 2622.

"Fines only" under the English law, were to be reasonable, otherwise they were "excessive" and they were considered unreasonable, and therefore excessive if they were made larger than one's circumstances and personal estate would bear. Whether they were reasonable or not was for a time determined by a jury; this practice, however, fell into disuse. Of this Blackstone says:

"And since the disuse of such inquest it is never usual to assess a larger fine than a man is able to pay without attaching the implements of his livelihood; but to inflict corporeal punishment, or a limited imprisonment instead of such fine as might amount to imprisonment for life." Cooley's Blackstone, Book 4*, page 380.

"Excessive fines" being prohibited by the Ohio bill of rights, it is not within the province of the legislature to use this form of penalizing offenses to accomplish severe punishment.

If this is to be accomplished, it is to be done by penalizing such offenses with imprisonment and then the accused becomes entitled to a jury trial by force of the 5th Section, Article 1, of the Bill of Rights, that:

"The right of trial by jury shall be inviolate."

The legislative way of classifying crimes is indicated by the penalty imposed, as for example, the first and second offenses for the unlawful possession or sale of intoxicating liquor are penalized with a fine only; hence these are misdemeanors, while the third offense is penalized by a fine or imprisonment in the penitentiary; hence the third offense is a felony.

According to the mere letter of the Ohio constitution, any or all of the crimes on the statute books could be penalized with a fine only, and if there is no limitation to this form of penalizing crimes, then the legislature can dispense entirely with jury trials and constitutional procedure.

The courts, of course, are considering this form of penalizing crimes as applicable only to misdemeanors, but whether an offense is a misdemeanor or a felony depends upon the way the legislature penalizes it. Would it have been constitutional to have doubled, or trebled, or quadrupled the fines only for the first and second offenses under the prohibition laws, without providing jury trials? If so, and there is no limit to its right to use this form of penalizing offenses, then by means of prohibitive fines life imprisonment can be made possible without jury trials.

Necessarily the legislature must be the arbiters of the penalties for the crimes it creates, but the exercise of this power is subject to the guarantees in Sections 5 and 10, Article 1, of the Ohio Bill of Rights.

The fundamental purpose of the framers of our constitution was to preserve for the people under the constitution what they had enjoyed under the general law of the land at the time of the adoption of the constitution.

Mayors Organized—A Menace to Liberty.

The particular menace to the liberties of the people in the system in vogue is the way mayors of municipalities can be organized and put to work specializing in the enforcement of prohibition, co-extensive with the county.

Mayors function in a dual capacity, exercising both executive and judicial powers except in cities having a police court or municipal court functioning independently of the mayor. Except for the enforcement of prohibition and otherwise in minor ways, mayors function entirely within their own municipalities.

The mayor of a village is its chief executive officer; he is its chief conservator of the peace, and then it is well to catch the significance of this in considering the use made of mayors of villages in the enforcement of prohibition:

"The marshal shall be the peace officer of the village and the executive head, *under the mayor,* of the police force. The marshal, deputy marshals, policemen, or night-

watchmen under him, shall have the power conferred by law to police officers in all villages of the state, and such other powers not inconsistent with the nature of their office, as are conferred by ordinance." (Section 4385, General Code of Ohio.)

By this section any force organized under authority of Section 6212-37, *supra*, comes "under the mayor" and subject to his control.

In state cases it is provided that:

"The mayor shall have final jurisdiction to hear and determine any prosecution for a misdemeanor unless the accused is by the constitution, entitled to a trial by jury." (Sec. 4536, G. C.)

His jurisdiction in such cases shall be co-extensive with the county. The final jurisdiction of mayors under this section, otherwise than as to prohibition offenses, is of a very minor character.

The mayor of a village presides at the meetings of council and has a vote on legislation in the event of a tie, so he is, to a slight extent, a legislator.

As will be seen, the mayor of a village, within his own village, is chief of everything. Chief executive officer, chief conservator of the peace, chief of police and the only judge within his village.

This anomalous situation of mayors of villages was seized on and made the basis of the system in vogue in this state for enforcing prohibition.

If there is a finality of principle in government it is that a separation of the legislative, executive and judicial departments, and freedom to function independently, is essential to the preservation of the liberties of the people. Our forefathers entertained this view and constructed the Federal government on this theory and it has stood the test of time and confirmed the wisdom of their action. Federalist (Hamilton), p. 429.

Mayors in their way of functioning violate this fundamental principle of government, but so long as they were left alone to exercise a very minor jurisdiction within their own municipality, where the people had the power of political restraint, it was not a matter of serious concern, but for the enforcement of prohibition they were given final jurisdiction co-extensive with the county, Sec. 6212-39, of an entirely new class of crimes penalized with heavy fines only, and with amazing freedom of action in the exercise of this jurisdiction, and it is a matter of serious concern when the council of a village can organize a force under its mayor and set him to functioning in his joint capacity as executive and judge co-extensive with the county in enforcing prohibition, or any other class of crimes.

Mayors of villages thus become, as it were, mayors of the county, in so far as enforcing prohibition is concerned, and the citizenry of the county are left without even the power of political restraint.

It may be said that all this is, is that mayors have been put to doing on a large scale what they have heretofore done on a small scale within their own municipalities. This in a sense is true, but there is a difference; the proponents of the laws for the enforcement of prohibition made a mole hill of jurisdiction into a mountain of jurisdiction with authority of council of giving mayors a corresponding increase of executive or police powers commercialized to create the proper enthusiasm in the enforcement of prohibition co-extensive with the county. There is a vast and essential difference between the mayor of a village organized under authority of Section 6212-37, *supra*, and one unorganized and left to function in the ordinary way within his own village.

It is pertinent to note that only those mayors running liquor courts and making a business of enforcement of prohibition, co-extensive with the county, have been the subjects of public criticism.

During the pendency of this case, it has come to the court's notice that the council of the village of North Col-

lege Hill repealed the legislation creating its liquor court, and Mayor Pugh was thus forced out of the business of enforcing prohibition co-extensively with the county. Prior to this the force under him was terrorizing the entire western section of Hamilton county, and almost every day Mayor Pugh's name appeared on the front pages of the daily papers.

Mayors of villages (most of the cities have police and municipal courts) by reason of their anomalous way of functioning, furnish the only opportunity in the judicial system of this state, of a system of law enforcement such as was given the prohibitionists for the enforcement of the prohibition laws.

Mayors are the only officials exercising two functions of government. Where the three departments of government are separate and function independent of each other, the system in vogue would be impossible, and any legislative attempt to fasten such a system around any other official, would be concededly unconstitutional. (56 O. S., 628.)

If there is no constitutional weakness in what has been done for the enforcement of prohibition, then the system can be extended by legislative authority to accommodate other groups of the citizenry for the enforcement of other classes of crime.

The gambling laws; Sabbath breaking laws; sex laws; any class or kind of crime can be enforced in the same way. Village councils could then organize under the mayor, a special force for each class of crime, and have its prohibition "squad," its gambling "squad," and so on, *ad libitum*, according to the demands of ever increasing groups, having reforms which they wish enforced by criminal action.

Mayors of municipalities were not expressly created as judges, but just grew up by the legislature from time to time conferring upon them jurisdiction of misdemeanors. (7 O. S., 387; 65 O. S., 390.)

The legislature in the exercise of its power to provide for the organizations of municipal corporation, created the

office of mayor and made him the chief executive officer. Section 4248, General Code, provides:

"The executive power and authority of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law."

Nowhere are mayors mentioned as judges except from time to time they have had extended to them the right to exercise judicial power.

Now mayors have been assigned a place in the judicial system of the state as courts inferior to the courts of appeal, which the legislature may establish under authority of Article 4, Section 1 of the constitution, and as such have a right to receive and exercise judicial power which the legislature may from time to time give them.

In *Markle* v. *Town Council of Akron,* 14 O., 589, the claim was made that the making of ordinances and by-laws by a town corporate is legislation and that it could not be done because such power by the constitution was vested in the General Assembly. As to this claim, the court said (page 591):

"It is not, however, the exercise of legislative power. A statute enacted by the general assembly prescribes a rule of action which operates upon all—the willing and unwilling. It comes from the superior, and the inferior is bound to obey it. The charter to a municipal corporation is the exercise of legislative authority. It permits the establishment of by-laws and ordinances; but these are a matter of compact and agreement among the corporators. They do not act upon others, but only upon themselves, and by mutual consent, either directly or indirectly expressed, through the city or town council. These ordinances, so made, are not the legislative power vested exclusively in the general assembly."

By a parity of reasoning the power of a mayor to enforce municipal ordinances and by-laws, would not be the

exercise of judicial power of the state which, by the constitution is vested in the courts; but his right to enforce municipal ordinances and by-laws, like the right of council to make them, is a matter of compact or agreement of the corporators.

The courts have had no trouble in assigning constitutional reasons for limiting the force and effect of municipal ordinances and by-laws to the municipality making them. The territorial limits or judicial district of a mayor enforcing municipal ordinances, is his municipality. The state, however, has been making ever increasing use of mayors as its agents in the enforcement of the criminal laws of the state. There is no question but that in enforcing the criminal laws of the state, mayors are exercising the judicial power which, by the constitution, was vested in the courts.

It is constitutionally necessary that they be held to be courts to entitle them to receive and exercise the judicial power which the legislature has vested them with; but they are created as executive officers and nowhere as judges in any legislation concerning them. They have been built up as judges until now when organized under Section 6212-37, *supra,* they can function as executive and judge in enforcing prohibition co-extensive with all the counties in which their municipality has territory. *Wilkins* v. *State,* 23 N. P. (N. S.) 393; *State* v. *Pape,* 105 O. S., 515.

It is quite possible to organize, if they do not already exist, four or five villages with liquor courts at pivotal points in the state where counties containing the more populous cities come together; liquor courts that would have under their jurisdiction 50 to 75 per cent. of the people of Ohio.

The village of Milford has territory in Hamilton and Clermont counties, and the village of Loveland has territory in Hamilton, Clermont and Warren counties. Hamilton county constitutes the first judicial district; Clermont county is in the first subdivision of the fifth judicial district, and Warren county is in the third subdivision of the

second judicial district. Here are villages each having a population of from twelve to fifteen hundred, electing mayors functioning in the enforcement of prohibition over a population of half a million.

It would be interesting to have a tabulation of the political subdivisions—counties, townships, villages and cities, in which these mayors are functioning.

Justices of the peace, as constitutional and now as legislative courts, municipal courts and mayors have always been given final jurisdiction of misdemeanors to some extent co-extensive with their counties, and the power of the legislature to be so has uniformly been sustained by the courts. The constitutional courts have their judicial districts, and to a large extent the subject-matter of their jurisdiction and where they are to be elected, fixed in the constitution.

The power given the General Assembly of creating inferior courts was given to accommodate the needs of the judicial districts into which the state is apportioned for judicial purposes, and political subdivisions, the counties, townships, and municipalities. A fair inference from all the provisions of the constitution relating to inferior courts, is that the judges thereof as to the subject-matter of their jurisdictions are to function in and be elected by the electors of the judicial district or political subdivision, for which the courts were created. How, otherwise, can it be said that the people are exercising their right of electing their judges?

As to this subject, the court in *Leland* v. *McBriar*, 15 O. S., 598, says:

"The general principle which pervades the constitution on this subject is that no one shall be allowed to participate in the election of officers whose jurisdiction will not extend over him, or territory include the place of his residence; but that the electors of each district or civil subdivision of the state shall have the right to select their own official representatives or public functionaries."

The construction placed by the courts on the provisions of the constitution relating to legislative courts, brings into the judicial system of this state unfortunate results.

The people are constantly being subjected to great inconvenience and wrong from the exercise of such jurisdiction by justices of the peace and particularly mayors of villages.

Some group or another of the citizenry, selfishly interested in the enforcement of some penal statute, is constantly making arrangements with a mayor or magistrate in the outlying sections of his county to take cases which will be brought to him, and the victims are forced into trials before courts with whom an arrangement has been made.

There is a difference between an inferior court expressly created by the legislature and mayors who have been made into judges in the indirect way I have pointed out. It surely is not in harmony with the judicial system of this state for the legislature to take an executive officer of a municipality and vest him with judicial power to be exercised here and there and most anywhere the legislature wills.

While I visualize in the way mayors of villages are being used in enforcing prohibition and the opportunity of extending the system in the enforcement of other classes of crime as constituting a very present menace to the constitutional liberties of the people, yet the particular purpose of mentioning the situation was for its bearing upon plaintiff's claim that he was forced to trial before an "interested" judge.

It is hard to conceive legislation better designed to hem a judge in a net of circumstances more likely to make him "interested" in convictions than this prohibition legislation.

There is here such an open opportunity for making easy money by convictions, that it is inconceivable that the mayors running these liquor courts are not "interested" in convictions.

In *Gregory* v. *C. C. & C. Ry. Co.*, 4 O. S., 678, the Supreme Court in its opinion quotes with approval the language of Chief Justice Parker in his opinion in *Pearson* v. *Atwood*, reported in 13 Mass., 324.

This case supports the claim of plaintiff that it is the way Mayor Pugh is involved, situated and circumstanced as head of this organization in the village of North College Hill that gives him his interest in convictions in liquor cases.

Our Supreme Court has this to say about the matter:

"In the case of *George A. Pearson* v. *John Atwood*, found in 13 Mass., 324, the interest of judges is discussed by Chief Justice Parker. The plaintiff brought an action of trespass against the defendant, for arresting the plaintiff, on a warrant held by the defendant as constable.

"It appeared that a justice of the peace had issued a warrant to the defendant to arrest the plaintiff for a violation of the Sabbath day; that by the laws of Massachusetts a moiety of the fines went to the town in which the justice resided, and that, therefore, he was interested. And, although the court did not find it necessary, in the case, to hold the act of the justice wholly void, yet the chief justice, in commenting on the law says: 'It is very certain that by principles of natural justice and of the common law, no man can lawfully sit as judge in a case in which he may have a pecuniary interest. Nor does it make any difference how small the interest is. Any interest, however small, has been held sufficient to render a judge incompetent. The only exception known to this broad and general rule, exists where there may be a necessity that the judge should act in order to prevent a failure of justice.' After reciting the opinion of Lord Mansfield, in the case of *Hestruph* v. *Braddock*, upon the subject of interest of witnesses and juries, Chief Justice Parsons says: 'It is true he does not comprehend a judge within his general exclusion on account of interest, but there can be no doubt that the principle applies, with equal strength, to them; and we

think, for this cause, *any judgment* rendered by a justice thus circumstanced, might be defeated. * * *"

"We think for the administration of justice, the safe way is, in all cases, for interested judges to decline acting in such cases, and where it appears on the record that they were interested, and acted on questions of fact, and especially when they were to select the jury, who try the facts, they should refuse to sit, and make known their interest at the earliest stage of the proceedings, that the case may, under our statute, be transferred to an adjoining county."

The circumstance of the "town" receiving a moiety (half) of the fines, was the basis of the conclusion of Chief Justice Parker that "any judgments rendered by a justice thus *circumstanced* might be defeated."

In the pending case not only the circumstance of the "town" receiving a moiety of the fine is present, but the further circumstance appears of the "town" giving its mayor the adjunct of a liquor court to be operated by him for the financial benefit of the town, its taxpayers, and all engaged in the work of the court, including the mayor himself.

Mayor Pugh is making a large additional income in fees and costs, in an entirely new class of cases, and his fees and costs, as well as the earnings of the others, are dependent on convictions in liquor cases, of which plaintiff's case is one and the earnings of all are wholly as a result of the adjunct of the liquor court given by the council of his village.

There is enough here even of a pecuniary interest coming to Mayor Pugh, hanging on the event of his decision, that is easily differentiated from that under consideration in the cases holding that court costs are not such a pecuniary interest as will disqualify a judge.

"If difference so vast should pass unobserved by the courts, the bandage upon the eyes of imaged justice would substantially change its symbolic meaning." (Schauck, J., 72 O. S., 346.)

Mayor Pugh was not only the judge of the law, but of the facts as well, in plaintiff's case. It can not be claimed that it was necessary for Mayor Pugh to try plaintiff's case in order to prevent a failure of justice, for any village mayor or justice of the peace in the county had the right to try plaintiff's case.

The constitutional means of securing the people in the enjoyment of their inalienable rights is the constitutional grant of remedy by due process of law. Remedy by due process of law is an adjudication by a *qualified* court proceeding according to the forms of the law. Instead of this for the enforcement of prohibition we have the *ipse dixit* of the executive head of a force of prohibition officers.

It is as if the chief of police of a city, or the sheriff of a county, was pulling his haul from a drag-net and adjudging the guilt and pronouncing the penalties.

It makes no difference, as a matter of fact, that a mayor must write what he does in a docket, it is his *ipse dixit* nevertheless although covered with a form of judicial procedure. The conclusive proof of this is in the wholesale prostitution of justice that has taken place in these liquor courts under cover of enforcing prohibition.

The court's view is that whenever the council of a village, acting under authority of Section 6212-37, *supra,* organizes a force of prohibition officers under its mayor, and puts him to enforcing prohibition co-extensive with the county, that it thereby gives him such an interest in convictions in liquor cases as to disqualify him from sitting in trials of such cases. This disqualifying interest comes from the way he is involved, situated and circumstanced as head of this organization.

One circumstance is the pecuniary benefit that accrues to him and all concerned in the work of the court.

Wherefore this court finds Mayor Pugh's conviction of plaintiff null and void and orders plaintiff discharged.

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WM. R. STANSBU
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No. 32094

Supreme Court of the United States

October Term, 1926. No. 527.

ED TUMEY,
Plaintiff in Error,

vs.

THE STATE OF OHIO,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF IN ERROR IN ANSWER TO SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

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Harry H. Shafer,
James L. Magrish,
Of Counsel.

Cincinnati, Ohio, January 11, 1927.

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THE STATE CAN NOT BY STATUTE BRIBE ITS OWN COURTS WITHOUT VIOLATING DUE PROCESS OF LAW.

After carefully reading the supplemental brief for defendant in error we believe that we have in our former briefs fully discussed all the questions raised, except the few matters we are noticing here. We have admitted that mayors at one time had county-wide jurisdiction in state misdemeanors in Ohio prior to the laws now being attacked. In thirteen populous counties that jurisdiction was abrogated by the Municipal Court acts. The abuses of

dragging citizens of the cities from their homes to little country courts long distances away led to the enactment of the following statutes: Akron, Sect. 1579-513; Alliance, Sect. 1579-230; Cincinnati, Sect. 1558-41; Columbus, Sect. 1558-55a; Dayton, Sect. 1579-86; East Liverpool, Sect. 1579-905; Hamilton, Sect. 1579-126a; Lorain, Sect. 1579-637; Newark, Sect. 1579-413; Piqua, Sect. 1579-596; Sandusky, Sect. 1579-273; Toledo, Sect. 1579-293; Zanesville, Sect. 1579-366.

The prohibition law revived these annoying practices. But our attack is not on the county-wide jurisdiction considered by itself. It is on the division of fines with the villages in state liquor cases, and the financial interest of the mayor personally and as executive head of the village. Opposing counsel seek to justify such provisions by citing cases to the effect that the state legally controls the use of its fines and any act of the legislature in that regard is free from judicial scrutiny. The state, of course, has a wide discretion as to the disposition of fines. It can not, however, bribe any court with its money. We understand counsel to contend that any part of the fines given to a village in liquor cases is not to be considered as a bribe, even if it stimulates the village and its mayor to more activity than would otherwise exist. The second paragraph on page 16, Suppl. Brief, seems to bear that interpretation. The meaning of stimulate as given in Webster's Dictionary is "to excite * * * by some *pungent motive* * * * as to stimulate by the *hope of reward.*" But the *pungent motive of hope of reward* to a judge is the definition of bribery. It is doctrine strange to law writers and adjudicated cases that a state may bribe its own courts. It would seem to us far more disgraceful and reprehensible than for an individual in an isolated case to bribe a particular judge. The bribery by the state of Ohio is on a

wholesale scale by general laws and affects every one of the eighty-eight counties of the state.

In the instant case Tumey lived six miles from the boundary line of the village of North College Hill. He was therefore a non-resident, and a village can not profit in a suit tried in its own court against a non-resident unless the suit is brought for violation of an ordinance. If the fine and costs of $123.40 had been paid by him, the mayor would have received $12.40 as his fee, and the village $25.00, all only in the event of conviction. These were the bribes. They were the *stimulation by hope of reward.* Counsel say that informers and secret service men have been known to the laws of the states and the United States before this. This may be true, but we have not been shown any judicial approval of their combination with a *bribed* court, and we submit that the entire surroundings of the Tumey trial can be considered by this court in testing the vital question of whether or not the proceedings were a mask and a sham.

President Coolidge is quoted (Suppl. Brief 32) to the effect that in order to hold the respect of its citizens the government must enforce its laws. Such enforcement, however, must be constitutional and we are confident the President would not approve the methods disclosed by the record in this case.

COMPENSATION OF MAYOR IS DEPENDENT UPON CONVICTION WITHOUT QUALIFICATION OR RESERVATION—EVEN ONE HUNDRED DOLLAR A YEAR ALLOWANCE BY COUNTY COMMISSIONERS CAN ONLY BE MADE WHERE THERE IS A CONVICTION.

It seems to us that the reference to the Ohio law on page 21 of opposing counsel's supplemental brief is open to the interpretation that the County Commissioners may allow

mayors up to one hundred dollars for fees in trying misdemeanor cases such as is here involved even though the defendant is acquitted. We wish to point out that the law is distinctly settled that even this one hundred dollar allowance can not be made unless the mayor finds the defendant guilty. See page 11 of our main brief, page 7 of our reply brief, Opinions of the Attorney General for 1915, page 158, and original letter from the Attorney General of Ohio filed with the court.

Opposing counsel claim (page 19, Suppl. Brief) that making the compensation of the mayor dependent upon conviction is sustained by long usage, and point out that as early as 1692 fees were established in Massachusetts for justices of the peace in civil and criminal cases. It should be noted that it does not follow from the fact that compensation was in the form of fees, that the fees were payable only upon conviction. In fact, just the opposite was the case in Massachusetts, at least in 1792. Opposing counsel state (page 19, Suppl. Brief): "In Massachusetts, in all criminal cases where the accused is guilty, the state does not pay costs; but where he is convicted, he is adjudged to pay costs in all cases except where there is a judgment of debt or where the costs are included in the forfeiture." 6 Dane's Abridgement of American Law, 563, is cited as authority for the statement. On that very page of Dane's Abridgement there appears the following:

> "By this Act it is enacted that the Supreme Judicial Court or Court of Sessions may tax legal costs for justices, officers, assistants, jurors, witnesses, and court charges, where the person accused is tried or not, or whether he be convicted or acquitted, to be paid out of the county treasury on a copy of the bill of costs made by the clerk."

The act referred to is in part as follows:

> • • • "in all cases wherein any costs have already arisen or may hereafter arise in any criminal prosecution commenced either before the Supreme Judicial Court or Court of General Sessions of the peace in any county in this Commonwealth, the court before whom such prosecution has been or may be so commenced (having cognizance of the offense), shall have power to allow and tax such costs for justices, officers and their assistants, jurors, witnesses and for court and other charges as have arisen or may arise, except in cases which are or may be otherwise provided by law, and in which a discretionary power is or may be given to the Court, *whether the accused be brought to trial or not, or whether he be convicted or acquitted upon trial;* and all such costs so taxed shall be paid out of the County Treasury." Mass. Acts, ch. 53, passed March 6, 1792, approved March 8, 1792.

The practice then in Ohio of making the compensation of the mayor depend upon his finding a defendant guilty certainly can not be supported by long usage if the usage in Massachusetts is to be used in support of the contention.

Opposing counsel apparently do not deny that the compensation of a judge at common law did not depend upon his finding the defendant guilty. No usage has been shown, and we contend that there is none that is sufficient to change the common-law right of an accused person to be given a fair trial by a court not financially interested in his conviction. If it is a sound principle of our jurisprudence and of due process of law that a trial court may be financially interested in its decision, it is just as sound a principle that an appellate court or courts may be financially interested in their decisions. We contend that such is not our jurisprudence or law, and that a judgment of a court which is directly financially interested in its decision, as in this case, is a mask and a sham and not a legal tribunal.

NO REVIEW ON WEIGHT OF THE EVIDENCE OR SIZE OF FINE.

Opposing counsel do not deny that only the record of the mayor's court can be reviewed in the upper courts (which record itself is tainted since the mayor is financially interested in his decision), but argue that the reviewing courts may reverse a judgment such as this case, on the weight of the evidence. The opposite is distinctly held in the case of *Fike* v. *State*, 4 O. C. C. (n.s.) 81, from which we quote:

> "It is urged further that the conviction of the defendant and the judgment of the mayor was against the weight of the evidence. Without discussing the question at any great length I will say that we hold that under the statutes in this state, a judgment of the mayor in cases of prosecution for a misdemeanor can not be reviewed upon the weight of the evidence. There is no provision in the statute for such review. Section 6565 relates to bills of exceptions before a justice of the peace, mayor and police judge, but that section only provides for a review on questions of law and not on questions of fact; and it has been held in the 26th O. S. 447, and the 34th O. S. 11, that the judgment of a justice of the peace can not be reviewed on the weight of the evidence under this section; also in 7 C. C. 208. Section 1752 is sufficient to permit the review on the weight of the evidence of a judgment of a mayor on a conviction for the violation of an ordinance, but is silent as to misdemeanors. So that we find that there is no provision for the review of a conviction before the mayor of a misdemeanor on the ground that the judgment is against the weight of the evidence; we therefore decline to consider these cases and have not considered them upon that question."

It should also be noted that General Code Sect. 6212-18, which is being attacked by the plaintiff in error, specifically states:

> "* * * Such mayor * * * shall have final jurisdiction."

We submit that the most that can be claimed for the power of the upper courts to review the evidence is the power to reverse on the evidence when, in the language quoted in the brief of opposing counsel (Suppl. Brief, p. 37), the decisions are "manifestly against the weight of the evidence" or "so clearly unsupported by the evidence as to indicate some misapprehension or mistake or bias on the part of the jury [court in this instance], or a wilful disregard of its duties." Where the error on the evidence comes within the prohibition of such tests, they are properly looked at as errors of law.

Hayner v. *State*, 83 O. S. 178, cited for the proposition that the reviewing courts in Ohio will consider whether or not a fine is excessive, involved only the question of the constitutionality of a particular statute which was attacked as in violation of the constitutional provision against the excessive fines. We know of no statutory or constitutional justification for *Shonberg* v. *State*, 30 O. C. A. 382, and consider the law of Ohio to be that the size of the fines can not be reviewed, other than on a claim that the fines violated the constitutional provision against excessive fines and that the said constitutional provision has no application where the State Supreme Court has held the statute under which the fines are imposed to be constitutional.

EXISTENCE OF POSSIBLE CORRECTIVE PROCESS WHICH FAILS TO CORRECT A JUDGMENT OF A "COURT" WHICH IS BUT A MASK AND A SHAM, DOES NOT RENDER THE JUDGMENT OF THAT "COURT" DUE PROCESS OF LAW.

Opposing counsel argue in their supplemental brief, page 54, that "after conviction he (the defendant Tumey) was insured further due process of law by reviewing his case on the evidence in two courts and on the law in three courts." Although not expressly appealing to the principle laid down in the case of *Frank* v. *Mangum*, 237 U. S. 309, opposing counsel's contentions might be interpreted as invoking the principle of that case, that a state may supply such corrective process as it deems proper, and that in determining whether the state has denied due process of law, some regard should be had for the proceedings in all the courts of the state. This principle has no application whatsoever in this case, and the review of the mayor's court provided by the laws of Ohio, which failed to correct the judgment of a financially interested court, did not render the judgment of that court due process of law. In *Frank* v. *Mangum, supra,* this court said:

> "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields so that there is an actual interference with the course of justice, there is in that court a departure from due process of law in the proper sense of the term, and if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob dominance, the state deprives the accused of his life or liberty without due process of law."

This case arose on application for a writ of habeas corpus, and the question was as to the *existence* of the facts which were alleged to show the mob domination of the trial court. The petitioner failed in his petition to give the affidavits showing the state's side to the contention of mob domination, and this court held that the Supreme Court of the state, having passed on the *existence* of the facts, relied upon to show mob domination, and having found adversely to the petitioner, this court without the affidavits showing the state's contentions, would look to the finding of the appellate courts and could not say from the record that the trial court *was* mob-dominated. In the later case of *Moore* v. *Dempsey*, 261 U. S. 86, the petition containing the facts relied upon to show mob domination was demurred to, and the facts for the purpose of the case were admitted. Even on habeas corpus this court held that the existence of the corrective process in the state which, however, failed to correct a judgment of a mob-dominated court, could not make the judgment of that court due process of law. This court said, page 91:

> "We assume, in accordance with that case (*Frank* v. *Mangum*), that the corrective process supplied by the state may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask * * *, and that the state courts failed to correct the wrong, neither perfection in the machinery for correction nor * * * can prevent this court from securing to the petitioners their constitutional rights."

In the instant case the facts which we allege made the trial court a mask and a sham are not disputed, namely that the trial court operated under the statutes set out in

our main brief at pages 4, 5, 6. Indeed this financial interest can not be disputed. This court will take judicial knowledge of the public statutes of the states.

Owings v. *Hull*, 34 U. S. (9 Pet.) 607, 9 Lawyers Ed. 246.
Harpending v. *Reformed Prot. Dutch Church*, 41 U. S. 455 (16 Pet.), 10 Lawyers Ed. 1929.
Fourth National Bank v. *Francklyn*, 120 U. S. 747, 30 Lawyers Ed. 825.

Under the statutes of Ohio it was to the personal financial interest of the mayor and also to his interest as executive head of the village to find the defendant guilty. This we repeat can not be disputed. The only question is whether with such a financial interest in a conviction, the conviction is due process of law. If it is not, as we contend it is not, and if the State of Ohio failed to correct the judgment of that financially interested court, but attempts to carry said judgment into execution, it deprives the defendant of liberty and property without due process of law. The procedural difficulties which were present in *Frank* v. *Mangum* and *Moore* v. *Dempsey*, are not present in this case, which comes into this court on a writ of error to the Supreme Court of Ohio. The circumstances which made the mayor's court a mask and a sham, do not depend for their proof on affidavits of parties interested or otherwise, but on *statutes* and an ordinance which admit of no doubt.

GUILT OR INNOCENCE NOT AN ISSUE IN THIS COURT.

Opposing counsel claim that the defendant Tumey was guilty of the offense charged and has no complaint in this court. The record shows that the defendant pleaded not guilty, and offered evidence in his defense. The guilt or innocence of the defendant *can not* be argued in this court,

and we have confined ourselves to the argument on the constitutional question. If authority be needed for the proposition that the guilt or innocence of the defendant Tumey is not an issue of this court, we cite the words of this court in *Moore* v. *Dempsey,* at 87-88: "The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have to deal with is not the petitioners' innocenec or guilt, but solely the question of whether their constitutional rights have been preserved." 261 U. S. at 87, 88. No unfavorable inference can be drawn from Tumey's failure to argue the question of guilt or innocence in this court.

MAKING COMPENSATION OF JUDGE DEPENDENT UPON CONVICTION HAS NOT BEEN HELD DUE PROCESS.

Opposing counsel now cite (p. 20, Suppl. Brief), *Herbert* v. *Baltimore County Commissioners,* 9 Md. 63a, 55 Atl. 376, for the proposition that making the payment of costs (fees) of the magistrate depend on conviction is not a denial of due process. That case, however, was a suit by a justice against the county commissioners for fees on the claim that the Maryland law limiting payment in criminal cases to $10.00 per month was unconstitutional. The court properly held that the justice was not denied due process and is of course no holding that a defendant tried by a financially interested court is given due process of law. No case has been cited by opposing counsel where any court held that a conviction by a judge whose compensation depended on conviction was due process.

CONCLUSION.

We earnestly reaffirm all the contentions of our prior briefs and submit, taking into consideration all of the points and arguments made by opposing counsel, that the trial court, which found the defendant guilty was personally and as executive head of the village financially interested in its decision and that its judgment which will be enforced by the State of Ohio, unless this court reverses the Ohio Supreme Court, denies due process of law in violation of the 14th Amendment to the Constitution of the United States.

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Cincinnati, Ohio, January 11, 1927.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 527.

ED TUMEY, *Plaintiff-in-Error,*

vs.

THE STATE OF OHIO, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

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IN THE

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ED TUMEY, *Plaintiff in Error,*

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N ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

THIS CASE PRESENTS NO FEDERAL QUESTION.

Plaintiff in error was convicted September 12, 1924, the Mayor's Court of the village of North College

Hill, Ohio, for illegally possessing intoxicating liquor in violation of state law. (Rec. 3, 27) The conviction was reversed by the Court of Common Pleas of Hamilton County, which judgment was reversed upon writ of error by the Court of Appeals of Ohio. (Rec. 28) The Supreme Court of the state denied a motion to certify the record (Rec. 31), and May 11, 1926, dismissed the petition for a writ of error. (Rec. 32) The case is before this court upon writ of error to the Supreme Court of Ohio under Sec. 237 (a) of the judicial code.

The prohibition law of Ohio, Sec. 6212-19 General Code, provides that in cases tried by a mayor one-half of the fine shall be paid into the municipal treasury. The state Constitution, Article XVIII, Sec. 3, empowers municipalities to exercise all powers of local self government and to enforce within their limits police regulations, not in conflict with general laws. Sec. 4536 of the General Code grants to mayors final jurisdiction to hear and determine misdemeanor cases unless by the Constitution the accused is entitled to a jury trial and provides that the jurisdiction of the mayor shall be coextensive with the County. Sec. 6212-37 General Code provides villages may authorize the use of any part of the fines received from prohibition cases to hire detectives, secret service men and attorneys to secure the enforcement of the prohibition law. On May 11th, 1923, the town council of the Village of North College Hill, adopted an ordinance (Rec. 26) providing that 50 per cent of the moneys from fines received by the municipality as its share under the state prohibition law should constitute a Secret Service Fund for the enforcement of the prohibition law; that in such cases the village deputy marshals should receive in addition to the usual fees, 15 per cent of the village's

portion of the fines collected; detectives and secret service operatives 15 per cent; the prosecuting attorney 10 per cent and that the mayor should retain his costs in such cases in addition to his salary as authorized by Secs. 4550, 4556 and 4270 of the General Code.

The substance of the complaint of the plaintiff in error in this case, as shown by the motion to dismiss (Rec. 5), is the alleged mercenary motive of the mayor and council of the Village of North College Hill, Ohio, in the passage of the ordinance to aid in prohibiting the liquor traffic and of the mayor and peace officers in acting under it. In short, it is alleged that there was, in effect, a conspiracy entered into by the Village officials to enforce the prohibition law for commercial purposes, and that the interest which the mayor had in the costs authorized to be assessed and his incidental interest as a taxpayer in the amount of revenue received by the Village from the collection of fines under the state law tended to so influence his action as to deny the accused "due process of law" guaranteed by the Fourteenth Amendment to the United States Constitution.

The plaintiff in error by testimony sought to prove the mercenary motives of the Village officials. (Rec. 9) The State courts on the evidence found against the contentions of the plaintiff in error. It is well settled that this court will not review the findings of a state court upon questions of fact.

Pure Oil Company v. Minnesota, 248 U. S. 158, 63 L. ed. 180.

Hedrick v. Atchison T. & S. F. R. Co., 167 U. S. 673, 42 L. ed. 320.

See also note, 63 L. R. A. 577.

STATE COURT OPINION SHOWS NO FEDERAL QUESTION NECESSARY TO ITS DECISION.

The Supreme Court of Ohio rendered no opinion. It merely entered an order overruling the motion to certify the record (Rec. 31), and sustained the motion to dismiss the petition in error for the reason that no debatable constitutional question was involved. (Rec. 31, 32) The opinion of the Court of Appeals (Appendix p. 23) shows that a decision upon no Federal question was necessary to its judgment in the case. The Court said:

> "It is not claimed that the laws under which the mayor exercises jurisdiction are unconstitutional, but we gather from the briefs and opinion of the trial court that the *modus operandi* in some way offends. If so, the remedy is with the people, and not with the courts."

Sec. 237 (a) of the judicial code as amended by the act of February 13th, 1925, as far as pertinent, provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * *where is drawn in question the validity of a statute of any State,* on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, *and the decision is in favor* of its validity, *may be reviewed* by the Supreme Court *upon a writ of error.*" (Italics ours)

No statute of the state was held valid in this case as against the contention that it violated the Constitution of the United States.

The allegations in plaintiffs motion to dismiss (Rec. 5) conclusively show the gravamen of his complaint is the manner and purpose for which the statutes and ordinance were invoked rather than objection to their constitutionality. It is respectfully submitted the record shows no grounds upon which this Court may entertain jurisdiction upon a writ of error.

Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 61 L. ed. 1153.

California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206.

Municipal Securities Corp. v. Kansas City, 246 U. S. 63, 62 L. ed. 579.

EVERY STEP TAKEN WAS AUTHORIZED BY LEGISLATIVE ENACTMENT.

Every step taken, or act done, or jurisdiction exercised, by the governmental forces of College Hill in the instant case was in accordance with the law of Ohio as approved by the Supreme Court of that state. The mayor of College Hill heard the case. He was regularly elected and was given his jurisdiction both under long standing as well as more recent legislative enactment.

(1) College Hill is a village. In such, Section 4536 of the General Code of Ohio gives the mayor the following jurisdiction:

> "He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor unless the accused is by the Constitution entitled to a trial by jury. His jurisdiction in such cases shall be co-extensive with the county," * * *.

Section 6212-18 of the General Code of Ohio gives the mayor special jurisdiction in cases such as the instant case as follows:

> "Any * * *, Mayor, * * * within the county with whom the affidavit is filed charging a violation of any of the provisions of this Act, when the offense is alleged to have been committed in the county in which such mayor, * * * may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury," * * *

In the instant case, imprisonment was not a part of the penalty and, therefore, the mayor had final jurisdiction and the defendant was not entitled to a jury trial. Work v. State, 2 O. S., 296, 59 Am. Dec. 671; Inwood v. State, 42 O. S., 186; State v. Borham, 72 O. S., 358, 74 N. E. 220; Hoffrichter v. State, 102 O. S., 65, 130 N. E. 157; Stiess v. State, 103 O. S., 33, 132 N. E. 85; State v. Pape *et al.*, 105 O. S., 515, 138 N. E. 79; Cochran *et al.* v. State, 105 O. S., 541, 542, 138 N. E. 54. The last four cases cited arose under the present prohibition laws of Ohio. In the last case cited, the court in quoting from the Hoffrichter case, *supra,* said:

> "It has long been the settled doctrine of this State, confirmed by repeated decisions of all our courts, that where the penalty imposed by criminal statute is merely a fine, the right of trial by jury as guaranteed by the Constitution does not apply."

Also, as noted in the quotation above from Section 6212-18 of the General Code of Ohio, the mayor "shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty."

The mayor thus had final jurisdiction in the instant case. This does not mean, though, that if error should intervene, the accused had no remedy, for Section 6212-18 of the General Code of Ohio also provides as follows:

> "Error may be prosecuted to the judgment of such mayor, justice of the peace, or judge as herein provided."

(2) The Village of College Hill was entitled to one-half of the fines. Section 6212-19, General Code of Ohio, which is a part of the act to enforce the liquor prohibitory laws of Ohio, is as follows:

> "Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, *one-half to the treasury* of the township, *municipality* or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer." (Italics ours.)

In Barth v. State, 107 O. S., 154, 140 N. E. 650, the Supreme Court of Ohio held:

> "Under the provisions of Section 6212-19, General Code, one-half of the money arising from fines and forfeited bonds resulting from the enforcement of the provisions of the state prohibition law, known as the Crabbe act, goes to the state treasury, and one-half thereof to the treasury of the county, municipality, or township of the judge or magistrate before whom the prosecution is held."

(3) The secret service ordinance passed by the Village of College Hill, providing for the payment of a

portion of the village's share of the fines to secret service agents and attorneys, is grounded in the Constitution of Ohio, in an enactment of the Legislature of that state, and in decisions of the Supreme Court of that state.

Section 3 of Article XVIII of the Constitution of Ohio provides as follows:

> "Municipalities shall have authority to exercise all powers of local self-government to adopt and and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Section 6212-37 of the General Code of Ohio, in force when this prosecution was undertaken, is as follows:

> "The council of any city or village may, by ordinance, authorize the use of any part of the funds collected for the violation of any law prohibiting the manufacture and sale of intoxicating liquors, for the purpose of hiring attorneys, detectives, or secret service officers to secure the enforcement of such prohibition law."

In State ex rel. Balser v. Bowen, etc., 111 O. S., 561, 563, 146 N. E. 108 the Supreme Court of Ohio said:

> "It is difficult to see in what particular the municipal authorities in either of these cases exceeded the power conferred upon them by law and ordinance. In the exercise of the police power possessed by them, such secret service agents and assistants as the local authorities deem necessary for the preservation of the peace and the enforcement of the law may be employed and compensated for services rendered under the terms of such employment. * * * Section 6212-37, General

Code (109 O. L., 9), specifically authorizes the use of any part of the fines realized from such prosecutions for the purpose of employing attorneys, detectives, or secret service officers to secure the enforcement of the prohibition law."

(4) Fees which the mayor and marshal of College Hill received belong to them by virtue of the general statutes of the state applying to all state cases, liquor and otherwise.

Paragraph 3 of the syllabus in State ex rel. Nead, etc., v. Nolte, decided by the Ohio Supreme Court, 111 O. S., 486, is as follows:

> "Section 4270, General Code, as amended (108 O. L., pt. 2, p. 1208) imposes no duty upon the mayor of a municipality to pay into the city treasury the fees taxed in favor of such mayor in the hearing of state cases."

On page 497 the court said:

> "The true interpretation of Section 4270, General Code, is therefore, that in all state cases the mayor of a city or village is entitled to hold the legal fees taxed in his favor;" * * *.

Therefore, in light of the foregoing, no step was taken or act done or jurisdiction exercised except in accordance with legislative enactment of the State of Ohio as approved by the Supreme Court of that state. Strange, indeed, then, would it be to say that the combined use of the various statutory enactments in a systematic manner deprived the accused of his property without due process of law, when every individual act done and jurisdiction exercised was in accordance with law.

MAYOR'S INTEREST IN COSTS ALLOWED BY LAW UPON CONVICTION DID NOT DISQUALIFY HIM.

The Mayor receives no part of the fines imposed. His remuneration is limited under the ordinance, Sec. 5 (Rec. 27) to his costs as fixed by the statutes of the state. Secs. 4550 and 4556, General Code, provide the fees of the mayor in all cases shall be the same as those allowed justices of the peace. These are fixed by Sec. 1746 of the General Code. Such were the fees taxed in the instant case (Rec. 4). The Mayor's remuneration is the same whether the maximum or minimum fine is imposed. Only the minimum fine of $100 was imposed in this case (Rec. 27). This negatives the suggestion of a conspiracy to mulct the accused for the benefit of the prosecuting witnesses and attorney.

Costs in criminal cases at common law were unknown. They are entirely the creation of statutes (15 C. J. Costs p. 317). That there was no provision for taxing costs in the event of acquittal, and that the mayor could assess costs only upon conviction, except as he might require bond for costs from unofficial prosecutors as provided in Sec. 13499 of the General Code, did not *per se* disqualify him to try the offense. It is the almost universal rule that in the absence of specific legislation the state is not liable for costs. (15 C. J. Costs p. 328.) It is the general practice to provide for the assessment of trial fees in the event of conviction. That such costs are collectible only upon conviction does not constitute a denial of due process of law.

In Ex parte Guerrero, 69 Cal., 88, 10 Pac., 261, it was held that a mayor as ex officio city judge is not disqualified from presiding in the trial of a liquor prose-

cution because the fines are paid into a salary fund.

Bennett v. State, 4 Tex. App. 72, held that the fact that the statutory compensation of a county judge is a fee to be paid by the defendant if convicted does not disqualify him as being "interested" within the meaning of the constitutional inhibition.

See also People v. Edmunds, 15 Barb., 529, and Commonwealth v. Keenan, 97 Mass., 589.

It is held in Wellmaker v. Terrell, 60 S. E., 464, 3 Ga. App., 791, that interest in costs fixed by law is not such a pecuniary interest as to disqualify a judge.

Pace v. City of Hazelhurst, 70 S. E., 967, 9 Ga. App. 203, and Longston v. City of Hazelhurst, 71 S. E., 592, 9 Ga. App. 449, even go to the extent of holding that if in the event of a conviction a mayor receives a portion of the fine as his costs, he is not disqualified to try the accused.

Legislation providing for the taxation of costs against the accused upon conviction is predicated upon the theory of making the violator bear the expense to which he has placed the state in securing his apprehension and punishment. In some jurisdictions no fees may be taxed against the state upon conviction. In other jurisdictions where the state has to pay the costs upon acquittal a smaller fee is provided than is authorized upon conviction when the defendant pays the costs. As an illustration, see Sec. 3504 of the Code of Virginia. In counties and villages where the criminal prosecutions are too few to justify the maintenance of a full time salaried police judge or magistrate it has for years been the practice to compensate such officers by fees and as far as possible to make the defendant pay the costs of prosecution.

In Ohio the policy of permitting a Mayor to retain

his fees was embodied in the statutes as early as 66 v. 170, see also R. S. 1751. The same principle has continued, with modifying amendments, to the present Sec. 4270 of the General Code. For a discussion by the Ohio Supreme Court, see State ex rel Nead, etc., *supra*. The right of a Mayor of a village to retain his fees is grounded upon the general statutes of Ohio and the amount of compensation he may receive is fixed by the State law—not the ordinance. The authority of a village to permit a mayor to retain his fee upon conviction is the same in prohibition cases as in other offenses. The Legislature has made no exception in the matter of prohibition enforcement. The entire subject of costs is one of statutory regulation and of legislative policy. Statutes and ordinances providing that trial fees for magistrates or mayors may be assessed against defendants upon conviction, or providing fees higher when such fees are paid by the accused than when paid by the state or municipality have been so long and so generally accepted that few cases are to be found attacking them. To hold the legislation of Ohio invalid as denying due process of law, because of the interest of officers in the outcome of the trial would be to upset years of legislative practice and invalidate legislation of this character not only in Ohio, but in many other jurisdictions.

MAYOR'S INTEREST AS TAXPAYER IN MUNICIPAL REVENUE FROM STATE FINES DID NOT DISQUALIFY HIM.

Complaint is also made that because a portion of the fines are paid into the municipal treasury, the mayor as a taxpayer, therefore, has such an interest as to disqualify him. Under such a theory only mendicants

would be eligible to serve as judges, magistrates and jurors. In numerous cases, it has been held that a judge is not disqualified by reason of interest to determine an action for a penalty or forfeiture on the ground that such penalty or forfeiture goes to the municipality of which he is a resident and taxpayer.

See Ex parte Guerrero, 69 Cal., 88, 10 Pac., 261;
State v. Intoxicating Liquors, 54 Maine, 564;
State v. Severance (Me.), 4 Atl., 560;
State v. Craig, 80 Maine 85, 13 Atl., 129;
Commonwealth v. Emery, 65 Mass. (11 Cush.), 406;
Hanscarrib v. Russell, 77 Mass. (11 Gray), 373;
State v. Batchelder, 6 Vt., 479;
Colgate v. Hill, 20 Vt., 56.

PROVISION AUTHORIZING FEES FOR INFORMERS AND PROSECUTING ATTORNEY CONSTITUTIONAL.

That the witnesses who testified against the accused may have had a pecuniary interest in the outcome of the case merely affects the weight of their testimony, not its admissibility, or the validity of the legislation providing their compensation. This court said in United States v. Murphy and Morgan, 16 Pet. 203, 210, 211, 10 L. Ed. 937, 940:

> "The general rule undoubtedly is, in criminal cases as well as in civil cases, that a person interested in the event of the suit or prosecution is not a competent witness. But there are many exceptions which are as old as the rule itself.
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> "Another exception, quite as remarkable, and standing upon a ground applicable to the present

case, is that of a person who is to receive a reward for or upon the conviction of the offender; for he is universally recognized as a competent witness, whether the reward be offered by the public or by private persons. The ground of this exception is forcibly stated by Mr. Justice Bayley in the King v. Williams (9 Barn. & Cress. 549, 556), where he says:

> 'The case of reward is clear on the grounds of public policy, with a view to the public interest, and because of the principle upon which such rewards are given. The public has an interest in the suppression of crime and the conviction of guilty criminals. It is with a view to stir up greater vigilance in apprehending, that rewards are given; and it would defeat the object of the Legislature by means of those rewards, to narrow the means of conviction and to exclude testimony, which would otherwise be admissible. Another exception is, in cases where, although the statute giving the party or the informer a part of the penalty or forfeiture, contains no direct affirmation that he shall nevertheless be a competent witness, yet the court will infer it by implication from the language of the statute or its professed objects. * * *' ".

See also decision of Ohio Supreme Court in State ex rel Balser v. Bowen etc., *supra*, sustaining the principle of the legislation involved in the instant case.

This Court settled in Atchison, Topeka v. Santa Fe R. Co., v. Matthews, 174 U. S. 97, 43 L. Ed. 909 that a statute passed in the exercise of the police power providing for the taxing of a reasonable attorney's fee is not violative of the Fourteenth Amendment.

See cases cited in note, 11 A. L. R. 885.

Statutes providing for the taxing of attorney's fees in liquor prosecutions are valid:

Comm. v. Munn (Mass.) 14 Gray 361.
State v. Fritz, 80 Kan. 168, 101 P. 1013.
Brennan v. Roberts, 125 Iowa 615, 101 N. W. 460.
Nichols v. Polk County, 78 Iowa 137, 42 N. W. 627.
State v. Douglas, 75 Iowa 432, 39 N. W. 686.

COURTS CANNOT DECLARE A POLICY DIFFERENT FROM THAT FIXED BY THE LEGISLATURE.

Every step taken resulting in the conviction of the Defendant was authorized by law. The courts have nothing to do with the justice, wisdom, policy or expendiency of the law, such being matters purely of legislative deliberation.

In speaking of the exercise of the power of the General Assembly to confer jurisdiction, the Supreme Court of Ohio in Allen v. Smith, 84 O. S., 283, 290, 95 N. E. 829, 831, says:

> " 'The country in which actions are to be brought, as well as the mode of acquiring jurisdiction by notice to defendants, is regulated by statute.' *Whether or not this power is always wisely exercised; whether it always brings perfectly fair results, and whether such legislation is entirely reasonable, it is not important for us to inquire;* once the power to legislate on the subject and determine the venue of actions is found to exist in the general assembly, the wisdom of its exercise is not a judicial question." (Italics ours.)

This Court in Vidal, *et al.*, v. Girard's Executors, 2 How. 128, 197, 11 L. ed. 205, 234, in answering the objection that the devise to the College was contrary to public policy, declared:

> "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; * * * We disclaim any right to enter upon such examinations, beyond what the State constitutions, and laws, and decisions necessarily bring before us."
>
> Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174.

Included in the question of public policy as fixed by the Legislature are the statutes providing that a trial judge shall receive his fees from the accused in case of a conviction, and also statutes providing that a portion of the fines may be paid into the treasury of the political unit over which the trial judge is an officer.

CASES CITED BY PLAINTIFF IN ERROR HAVE NO APPLICATION.

None of the cases cited by plaintiff in error, so far as we have been able to observe, are in point on principle or fact. Space does not permit an analysis of each of the cases so cited. They either deal in the abstract with principles that here have no application or with a different legislative policy.

It is significant, however, that each case cited deals with some form of civil litigation in which either the sole, or primary, question involved was the adjudica-

tion of financial responsibility or of property rights. There the financial issue is paramount, a distinctly different proposition from the enforcement of criminal statutes where the primary question is guilt or innocence of a defendant of an infraction of a penal statute passed in the exercise of the police power. Here the financial interest of the trial justice is incidental only and limited to the trial fee fixed by law as the same, regardless of the amount of fine imposed.

It is also suggested that the opinion of the Court of Appeals of Ohio (Appendix p. 22) cites the case of Probasco v. Raine, 50 O. S., 378, and that this case has, in effect, been overruled by the decision of the U. S. Circuit Court of Appeals in Meyers v. Shields, 61 Fed. 713. Attention is respectfully called to the fact that the portion of the opinion cited by the Court of Appeals of Ohio in the instant case referred only to justices of the peace, an office not involved in the litigation and the validity of the statutes governing which was not in question. It is interesting to note, however, that the decision of the Federal judge relied upon by plaintiff in error carefully points out the distinction between the statute involved in that case and the legislation in the instant case. It was there said:

> "The magistrate or probate judge has the same fees taxed for his compensation whether one party prevails or the other, or whether the judgment is for a small sum or a large sum. His fee is secure if the parties are solvent, or he may protect himself by demanding security before the services are rendered. So that his compensation, which is usually but a small part of the judgment rendered, is assured if he is diligent; and its amount is not contingent upon the decision he makes. The case is therefore exceptional when the security of his

> compensation depends upon the party against whom his judgment is rendered. But, as we have seen, the auditor's compensation is directly dependent upon the finding he makes. If he finds against the taxpayer, he is sure of his reward, and it is secured by the highest lien, and most summary process for its collection. Not only is he interested in finding against the taxpayer, but his fee grows with the increasing amount of his assessment. The larger the assessment, the greater his commission. In the case now before me, if the auditor's assessment stands, his fee will be $7,360. The fee is evidently not intended to be given in the nature of compensation for services alone."

Our search of cases has not disclosed any case holding that statutes similar to those applying in the instant case keeps any person from having "justice administered without denial or delay", deprives "any person of life, liberty or property without due process of law", or nullifies "a mandatory provision of the Constitution"; nor have we found any case holding that fees received by a magistrate in accordance with statute or that fines replenishing treasurers of political subdivisions as provided by statute, renders a tribunal partial "in the adjudication of rights", or are of such a character as to "create bias in the mind of a judge" depriving him of jurisdiction.

Plaintiff in error, though, sets up the claim that his conviction was without due process of law. It would hardly be claimed that any one of the statutes involved in the instant case denied the accused due process of law. Then how could it be consistently claimed that the systematic use of all the statutes applying in the instant case denied him due process of law?

In considering the cases cited by opposing counsel, it must be kept in mind that the fines received by the municipality, fees received by the mayor, secret service funds created, secret service officers and attorneys employed and jurisdiction exercised are authorized by statute, all of such establishing the policy as fixed by the State Legislature. Therein lies a difference between not a few of the cases so cited by opposing counsel and the instant case.

Another distinction that opposing counsel fails to make is that the mayor did not have such a personal interest as would make him a judge in his own cause or a judge and party in the same case. He received no part of the fines and the receipt of his fees were not necessarily contingent upon a conviction of the accused, and it has never been held, so far as our investigation has gone, that a judge was disqualified because he received fees or because a portion or all the fines went to the political unit of which he is judge.

The mayor had never declared that regardless of evidence, he would find the accused guilty; and even if he had done so, the law provides the accused a recourse in error. Of this privilege he made use, but he did not ask a reviewing court to consider his case on its merits as to whether he was guilty or innocent.

Furthermore, the mayor was not in the position of a judge who had lost money through the failure of a bank, nor of a judge to whom one of the attorneys is financially obligated. The interest, if any, which attached to the mayor was only such as attached to any judge, state or federal, whose fees were fixed by statute and by whom the fines assessed went to enrich the public unit of which he was a judge and taxpayer.

CONCLUSION

Finally, the complaint is directed not against organized outlawry, but against organized enforcement of law. The statutes which apply established the policy as fixed by the Legislature of Ohio and each of these statutes has been passed upon favorably by the Supreme Court of that state. No fault is found by the accused with any one of these individual statutes, but fault is found with the systematic use that is made of them in cooperation with state and civic law enforcement agencies.

The plaintiff in error was not denied any rights that the law allows any other accused brought before the mayor and charged with a misdemeanor. The way to prosecute error was open to him just the same as to any other accused. Of this he took advantage, but he did not controvert the evidence showing his guilt or claim that the judgment was against the evidence. He ignored the merits of the case. In the final analysis, he makes no claim other than that he was the victim of such a systematic use of statutes establishing the policy of the state and approved by the state Supreme Court as to result in organized enforcement of law.

Wherefore, we contend that the accused was not denied due process of law or any other constitutional right.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS,

FIRST APPELLATE DISTRICT OF OHIO.

HAMILTON COUNTY, No. 2748.

STATE OF OHIO, *Plaintiff in Error,*

vs.

ED. TUMEY, *Defendant in Error.*

OPINION

December 7, 1925.

Per Curiam.

The defendant in error was convicted by the mayor of College Hill of a violation of the Crabbe Act. Error was prosecuted to the court of common pleas, which court, on review, denied the jurisdiction of the mayor to hear and determine the case, on the ground that the mayor was financially interested, in that he received costs in the action, reversed the judgment of the mayor, and discharged the prisoner. The state prosecutes error from that judgment.

The decision of the Court of Common Pleas is without authority of law. The Mayor's jurisdiction is defined by the statutes of Ohio, duly enacted by the legislature thereof. This jurisdiction should not, and cannot be limited or qualified by a reviewing court,

on the theory that the law is against natural justice and leads to oppression in the judicial administration of the office.

If the mayor, sitting as a judge, is guilty of corruption or oppression in office, the law provides a remedy.

It is fundamental that our government is divided into three branches, legislative, executive and judicial, and that neither should usurp the functions of the other. To hold that the mayor is without jurisdiction in a certain class of cases, for the reason that the law giving jurisdiction, although duly passed by the legislature, is objectionable, is an invasion by the judicial of the legislative branch.

The office of mayor is created by statutes. His jurisdiction, powers, and duties are clearly defined therein. His schedule of fees and costs is likewise provided by the statute. He received no part of any fine assessed. His jurisdiction under the Crabbe Act is defined with particularity.

The record does not present a judicial question. If the defendant did not receive a fair trial, that question is reviewable by a reviewing court, and if the record justified, a new trial would be ordered.

The large fines are provided by statute, and if the fine and judgment of the Mayor's court is within the limits provided, he is acting within his jurisdiction. The guilt or innocence of the accused is not argued.

Counsel for defendant in error in the brief argues that the constitutional rights of the defendant are invaded, in that the judge receives costs in the case, and, therefore, has a pecuniary interest, thus preventing defendant from having a fair and impartial trial. This proposition is answered by the Supreme Court in the case of Probasco, Executor vs. Raine, 50 Ohio St. 378. In the opinion the Court says:

> "A justice of the peace acts judicially, and is paid therefor by fees collected from litigants before him, and while his mind may be biased in

> particular cases, it cannot be claimed that he is thereby disqualified from discharging his judicial duties. A judge who is a large taxpayer in his county or city, is not thereby disqualified from sitting in judgment in cases against his county or city."

This authority is sufficient to show that the mayor is not disqualified from discharging his official duties, because of the fact that he received fees and costs in the case.

It is not claimed that the laws under which the mayor exercises jurisdiction are unconstitutional, but we gather from the briefs and opinion of the trial court that the *modus operandi* in some way offends. If so, the remedy is with the people, and not with the courts.

The opinion of the Court of common pleas and the argument of counsel for the defendant in error present cogent reasons why the legislature should act in the matter, but present no grounds justifying a reviewing court in nullifying the solemn act of the legislature. As was stated in the case of Probasco vs. Raine, *supra:*

> "Whatever may be the rule elsewhere, it is clear that in this state, the validity of an act passed by the legislature must be tested alone by the constitution, and that the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy."

If the view of the court of common pleas was correct, the effect would be to disqualify every mayor and justice of the peace in the state of Ohio from performing any judicial duties as such, and would in effect, be a nullification of the statutes giving jurisdiction to such officers.

Our attention has been called to the recent decision of the Supreme Court in the case of Decker vs. State of Ohio, No. 19056, as having some bearing on the case under consideration. We have a copy of that decision

before us. The question in that case was the right of the accused to be heard in argument, through counsel, after the evidence was concluded. The syllabus contains the law pronounced, under the court's rule, and is as follows:

> "1. The provision of Article 1, Section 10, of the Ohio Constitution which allows an accused person in any trial in any court to appear and defend in person and with counsel, is applicable to misdemeanor trials arising under the Crabbe Act for unlawful possession of intoxicating liquor.
>
> "2. Under Article 1, Section 10, of the Ohio Constitution, a defendant charged with misdemeanor has a constitutional right to be heard in argument through counsel after the evidence is concluded."

The case but reiterates a well known and long recognized statutory and constitutional right. It has no bearing on the instant case. No such question is here presented.

The judgment of the court of common pleas will be reversed, and the judgment of the mayor will be affirmed. Buchwalter, P. J., Hamilton and Cushing, J. J. concur.

(15)

FILED
DEC 28 1926
WM R. STANSBUR
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IN THE

Supreme Court of the United States

October Term, 1926

No. 527

ED TUMEY, PLAINTIFF IN ERROR

vs.

THE STATE OF OHIO, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR

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In The

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October Term, 1926

No. 527

Ed Tumey, Plaintiff in Error

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR

REPLY TO BRIEF OF PLAINTIFF IN ERROR

Jurisdiction of Municipal Courts

It is claimed that Municipal Courts can not have Constitutional Jurisdiction outside of the Municipality. The argument for this contention is based on English decisions and common law.

Due process is not limited to the courses and usages of the common law, as due process may consist of

modes prescribed by statute and entirely unknown to the common law. Twining v. New Jersey, 211 U. S. 78; Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272.

Only those usages and modes of proceeding existing at common law may be inquired into which are shown not to have been unsuited to our civil and political conditions by having been acted upon after the settlement of this country. Murray's Lessee v. Hoboken Land & Improvement Co., supra.

And there may be circumstances as the Court said under which "it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.'" In fact, "there is nothing in the Magna Charta, rightly construed as a broad charter for public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every foundation of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not useless forms." *Hurtado* v. *California*, 110 U. S. 516, 530, 531.

A State has the right to alter the common law at any time, although it has theretofore adopted it with certain limitations. If, through its court, it err in deciding what the common law is, yet if no fundamental and absolutely all-important right be thereby denied to an accused, he still has due process of law, and he can not complain to the Federal Court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the Federal

Constitution. West v. Louisiana, 194 U. S. 258. See Const. of U. S., Rev. and Annot., 1924, pp. 665-666.

MUNICIPAL COURTS GIVEN EXTENDED JURISDICTION IN SPECIAL CASES

The creation of a special court for a particular class of cases is not a denial of due process. In re Classen, 140 U. S. 200. Nor is a state prohibited by the Fourteenth Amendment to the Constitution of the United States from prescribing the jurisdiction of its several courts, either as to their territorial limits or the subject matter, amount or finality of their respective judgments or decrees. Missouri v. Lewis, 101 U. S. 22, 30.

In Section 744, page 1117, Dillon on Municipal Corporations, occurs the following:

> "It is competent for the Legislature to provide for these inferior courts (mayors, recorders, city and the like) and to invest them with measures of power and jurisdiction as may be deemed expedient, if no provision of the Constitution of the particular state be infringed."

Paragraph 5 of the syllabus of Holder Respondent v. St. Louis and San Francisco Railway Company, 55 Mo. App., 664, is authority for the following:

> "Under Section 37, Article 6 of the Constitution, the Legislature may confer jurisdiction upon justices of the peace over misdemeanors co-extensive with the county or may limit it to a particular township."

Stephens v. Williamson, 4 Ky. Law Rep. (Abstract) 985, is authority for the following:

> "The Legislature has an unlimited right to regulate the jurisdiction of magistrates not to extend to the abolishment of their office and may at any time regulate their fees."

Section 1 of Article 4 of the Constitution of Ohio is as follows:

> "The judicial power of the state is vested in a Supreme Court, Court of Appeals, Court of Common Pleas, Court of Probate, and *such other courts inferior to the courts of appeals as may from time to time be established by law.*" (Italics ours.)

Steamboat Northern Indiana v. James Milliken, 7 O. S., 384, is precisely in point and holds that mayors are within the number of such "other courts, inferior to the Supreme Court, in one or more counties, as the General Assembly may from time to time establish." For the same reason, mayors would be within the number of "such other courts inferior to the Courts of Appeals, as may from time to time be established by law."

In Ohio the section giving a mayor jurisdiction generally in misdemeanors is 4536, G. C. It is in part as follows:

> "He (mayor) shall have final jurisdiction to hear and determine any prosecution for a misdemeanor unless the accused is by the Constitution entitled to a trial by jury. His jurisdiction in such cases shall be co-extensive with the county," * * *.

Carey v. State, 70 O. S., 121, upholds the validity of this section. In that case, as found on page 123, it

was "insisted that the mayor of the village of Bedford could have no jurisdiction over an offense committed in the village of Lakewood." There the Court points out that Section 18 of Article 4 of the State Constitution provides that "the several judges of the Supreme Court * * * and of such other courts as may be created, shall respectively have and exercise such power and jurisdiction, at chambers or otherwise, as may be directed by law." Here the constitutional power given to the Legislature to clothe a mayor with judicial power and give him county-wide jurisdiction is recognized.

Furthermore, this statute is long established. It had its origin in 50 Ohio Laws, page 223, Section 51, in an Act passed May 3, 1852. That enactment gave the mayor jurisdiction co-extensive with the county in crimes and offenses committed in the corporation, Section 52 of the same Act giving the marshals of villages similar jurisdiction.

On February 23, 1858, as found in 55 Ohio Laws, page 9, an Act, supplementary to the Act of May 3, 1852, was passed. This Act gave mayors and marshals of a village situated in two counties jurisdiction in both counties over crimes and offenses arising in the corporation.

What is now Section 4536, G. C., and other sections were all included in one Act as found in 66 Ohio Laws, page 169, Section 4536 appearing as Section 114 of the Act. This enactment gave the mayor jurisdiction co-extensive with the counties not only over offenses committed within the corporation, but also over misdemeanors committed anywhere within the county. This Act also, as found in Section 141, gave the marshal of

a village jurisdiction co-extensive with the county. This last enactment was passed in 1869.

The mayor and marshal, therefore, have had jurisdiction co-extensive with the county over offenses committed anywhere within the county for over half a century.

With this background, Section 6212-18, G. C., as found in 108-Part 2, Ohio Laws, 1182, Section 6, was passed as follows:

> "Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county with whom the affidavit is filed charging a violation of any of the provisions of this act, when the offence is alleged to have been committed in the county in which such mayor, justice of the peace, or judge may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty, but error may be prosecuted to the judgment of such mayor, justice of the peace, or judge as herein provided. And in any such cases where imprisonment is not a part of the penalty, the defendant cannot waive examination nor can said mayor, justice of the peace, or judge recognize such defendant to the grand jury; nor shall it be necessary that any information be filed by the prosecuting attorney or any indictment be found by the grand jury."

This section along with the other parts of the enactment were approved upon a referendum by a majority vote of 290, 149.

At this time, municipal court acts were in effect which took away from mayors and justices of the peace outside of the cities having such municipal courts, jurisdiction over offenses committed in those cities. When

Section 6212-18 as quoted above came to be construed with the acts establishing these municipal courts, some courts held that mayors and justices of the peace outside of these cities did not have jurisdiction even in cases arising under the prohibition enactment. Other courts held to the contrary. Note respectively State Ex rel. Millish v. Cusick, Common Pleas Court, Montgomery County, and Wilkins v. State, 23 N. P. (N. S.), 393. To remedy this situation and to make itself understood, the Legislature at its next session amended Section 6212-18, G. C., as stated above, by adding the following:

> "The officers named herein shall have authority to issue search warrants as provided for in Section 6212-16 of the General Code, and the jurisdiction granted herein shall be co-extensive with the county whether or not within the county there is a municipality having a municipal court."

The section as quoted above with the addition just quoted is Section 6212-18, G. C., as it now stands. Under the decisions, the Legislature had full constitutional power to give mayors and justices of the peace such jurisdiction.

The granting of jurisdiction to a magistrate or mayor beyond the limits of the political unit by which he is elected is not an innovation and is not confined to Ohio as illustrated by the following:

Alabama—Section 1954. Police jurisdiction given in some cities three miles outside the city limits and in others one and one-half miles outside the city limits.

Section 1935. The recorder exercises jurisdiction inside and outside the city limits within the police juris-

diction, therefore, in some instances three miles and in other instances one and one-half miles outside the city limits.

Arizona—Section 812, Penal Code, 1913. Where offenses are committed within five hundred yards of the boundary line of county, jurisdiction attaches in either county.

Arkansas—Section 6386, Digest of Statutes 1921. Justices of the peace elected in townships.

Section 6398. They are granted jurisdiction co-extensive with the county in which elected or appointed.

Section 6401. Criminal actions and proceedings may be brought before any justice of the peace in the county. See in this connection, Steel v. Karb, Sheriff, 78 O. S., 376, and Stiess v. State, 103 O. S., 33.

California—Section 1425, Penal Code 1923, Dearing. Justices of the peace have jurisdiction over certain offenses within the county in which the courts are established.

Colorado—Section 3725, Compiled Laws of Colorado 1921. Jurisdiction of justices of the peace in liquor cases extends throughout the county.

Section 6822. Jurisdiction of justices of the peace extends throughout the county in disturbances of peace.

Section 1583. County-wide jurisdiction is given to justices of the peace in offenses under fish and game laws and in numerous other instances.

14 Colo. App. 167. Under general statute 2025, a justice of the peace has jurisdiction co-extensive with the county.

Connecticut—Section 3094, General Statutes 1918. Justices of the peace in New Haven and East Haven are given jurisdiction over offenses committed in New Haven harbor and vicinity, and justices of the peace of Bridgeport and Stratford are given jurisdiction over offenses committed in Bridgeport harbor.

Delaware—Section 195, Revised Code of Delaware 1918. Any justice of the peace of either of two dry counties has jurisdiction to hold preliminary hearings on violation of dry law in either county.

Section 156. Gives county-wide jurisdiction in liquor cases.

Sections 2388 and 2517. Gives county-wide jurisdiction in fish and game cases.

Georgia—Mayors of towns and villages have the same jurisdiction as justices of the peace in criminal matters. See Parks Ann. Penal Code, 1914, Sec. 790 (a), indicating that while omitted from the code of 1910 it was still in force. Originated in Acts 1890-1, page 66.

Illinois—Chapter 79, Paragraph 166. Constables are given county-wide jurisdiction.

Montana—The Police Court also has concurrent jurisdiction with Justices' Courts throughout the county to punish vagrancy as a crime against the State and such prosecutions must be instituted and conducted in the name of the State of Montana—State vs. District Ct., 37 Mont. 202 or 95 Pac. 841.

Nebraska—Rema v. State, 72 N. W., 474, 52 Neb. 375. The jurisdiction of a justice of the peace is co-

extensive with the county and a judgment rendered outside of his precinct is not void.

New York—57 N. Y. S., 363. A justice of the peace of the city of Lockport has jurisdiction over the county in which Lockport is situated. To the same effect is McKey v. Lockner, 59 N. Y. S.

North Carolina—Mayor is given jurisdiction the same as justices of the peace over offenses against state laws, extending the jurisdiction beyond the limits of the town one mile. Court held procedure valid in State vs. Brown, 159 N. C. 468.

Virginia—Section 3092, General Laws 1923. Justices of the peace elected by qualified voters of each ward in charter cities are made conservators of peace and have jurisdiction within the whole city and one mile beyond the limits.

Section 3011. Mayor clothed with all power and authority of a justice of the peace in civil and criminal matters within the county where his town is situated.

Section 4675-25. Mayors have jurisdiction in city and three miles beyond city limits.

West Virginia—Constitution, Sections 7 and 8 of Article 8. Each county divided into magisterial districts, one to two justices of the peace for each district.

Section 28. The jurisdiction of justices of the peace extend throughout the county. They are conservators of the peace and have such jurisdiction and powers in criminal cases as are prescribed by law.

Section 32, Chapter 32-A, Page 582, Barnes West

Virginia Code Annotated, 1923. A justice of the peace has concurrent jurisdiction with the circuit court and other courts having jurisdiction in criminal cases in his county in first offenses under the liquor law enforcement act.

Section 39. A mayor is an ex-officio justice of the peace and conservator of the peace and he shall exercise all powers vested by law in justices of the peace and such jurisdiction "extends to and includes cognizance of criminal offenses committed anywhere within the boundaries of the county in which his city, town or village is situated, and is not limited to cognizance of offenses committed within the corporate limits of such city, town or village." Ex parte James Watson, 82 W. Va., 201, 95 S. E., 648. See also Section 19 of Article 8, West Virginia Constitution.

Thus it will be noted that it was common procedure in the states to extend the jurisdiction of municipal courts beyond the municipal limits one or more miles, and also to extend the jurisdiction of justices of the peace and mayors beyond limits of the unit by which they were elected. The purpose of extending the jurisdiction in the first instance was to break up places of outlawry that were located on the municipal boundary just outside of the city. The Legislature also faced the situation that in some of the cities the law enforcement agencies were failing to perform their duty, and, therefore, in order that those forces that believe in enforcement and upholding of law might have some courts through which process could be had, it gave to mayors county-wide jurisdiction.

POWER TO DISTRIBUTE FINES IN STATE CASES BELONGS TO THE LEGISLATURE AND DIVISION OF FINES AS IN INSTANT CASE IS PRECEDENTED.

It is claimed that the division of fines under a state law with a village is unprecedented and that from this fundamental vice radiated all the evils about which complaint is made. It is difficult to understand the logic of this proposition, since the state legislature has the power to extend the jurisdiction of the mayor's court beyond his municipality, as hereinbefore showed.

The division of fines is not a judicial but a legislative question. Galpin v. City of Chicago, 159, Ill. App. 135, affirmed 94 N. E. 961, 149 Ill. 554, is authority for the following:

> "The legislature is the sole and exclusive authority for the appropriation of the funds of the state, whether such funds arise from fines and forfeitures imposed in its courts upon violators of its laws * * *. The courts have no power equitably to distribute these funds."

In Jackson County v. Derrick et al., 117 Ala., 348, at page 359, the court said:

> "Legislative power over public revenue, from whatever source derived, no element of contract intervening, compelling a particular application or appropriation, is unrestrained by constitutional limitations. From the very nature of the fine and forfeiture fund, because of the sources from which it is derived, it is particularly true that legislative domination over it is absolute.

State v. Stone, 69 Ala. 206; Sessions v. Boykin, 78 Ala. 328; Harold v. Herrington, 95 Ala. 395."

See also Sanders v. Court of County Commissioners, 117 Ala. 543.

Where the court had under consideration the question of the legality of the payment of fines for the benefit of an abandoned wife and children, it said in Postelwait v. State, 228 Pac., 789 (Okl. Cr. App.), as follows:

> "In absence of a constitutional restriction the Legislature may provide for such disposition of fines in criminal cases as it deems advisable, and may, in an abandonment case, provide that fines shall be for use and benefit of abandoned wife and children."

A case bearing on this point, and especially on the feature providing that a portion of the fines shall go to informers, is Southern Express Company v. Commonwealth of Virginia ex rel Walker, 92 Va. 59. Paragraph 1 of the syllabus is as follows:

> "Section 1220 of the Code, imposing a forfeiture of not less than $100 on express companies and others for excessive charges, one-half of which is given to the informer, is not in conflict with Section 7 of Article VIII of the Constitution of the State. The fines mentioned in the Constitution are the fines imposed by law as a punishment for crime, and do not include forfeitures recoverable in a collateral action, but even if such forfeitures are embraced within the constitutional provision, the fine dedicated to the Literary Fund is the State's part of the recovery."

On page 65 the Court says:

> "If the Legislature possesses the right, as it does, to impose a fine or forfeiture, it has the power appurtenant to such right to prescribe the proceeding or adopt the means deemed by it most likely to result in the enforcement of the fine or forfeiture. If it thought that its policy, as evidenced by the forfeiture provided for in Section 1220, was more likely to be enforced by giving one-half of the forfeiture for the use of the informer, it had the right to do so, and only such part as it reserved for the use of the State would be covered by the constitutional provision."

What the court here says could well be paraphrased to fit in the instant case. If the legislature thought that its policy, as evidenced by the statutes giving the municipality one-half of the fines, and by giving the municipality power to pass an ordinance to use a portion of these fines in the employment of secret service officers, was more likely to result in better enforcemnt of the law, it had a right to do so.

The court in the last case from whose opinion we have just quoted, further said:

> "Moreover, it has been the practice of the Legislature, for a hundred years or more, in declaring forfeitures and fixing fines in certain cases, to provide, with the view of stimulating prosecutions in such cases, that an informer should be entitled to a part of the forfeiture or fine. Many such statutes were in the Code of Laws of the State and in force at the formation of the present Constitution when Section 7 of Article VIII was introduced for the first time into the organic law."

The above case was affirmed by the Supreme Court of United States in 168 U. S. 705.

The purpose of the Legislature of Ohio in giving one-half the fines to the municipalities or other local unit where the case was tried, and to permit it to use all its share of the fines in securing evidence, was to stimulate prosecutions of violators against the prohibitory laws of that State. Not only in liquor cases is there a division of the fines, but there is a similar division in other cases.

Section 1445, General Code of Ohio. Fines collected under Act go to the State Treasurer for the use of the Secretary of Agriculture. The Secretary of Agriculture pays the fish and game protectors a percentage based upon the fines collected in cases made by him. The Attorney General of Ohio in opinion No. 1353 rendered April 12, 1924, holds payment in this manner legal. See copy of opinion filed herewith and marked "Defendant's Exhibit A."

Section 843-53. Fine paid into State Treasurer for the use of the State Fire Marshal.

Section 3056, G. C. Fines collected by a police court in misdemeanors prosecuted in the name of the State to be used for the support of County Law Library Associations and for compensating the judges, clerk and prosecuting attorney of such court. See State ex rel v. Sayre, 90 O. S. 215.

Section 6139, G. C. The forerunner of the section involved in the instant case, providing for the use of a portion of the fines to hire detectives and secret service officers in this section. It authorized the council to "use any part of the fines, collected for the violation of the local option law, for hiring detectives

or secret service officers to secure the enforcement of such law." This law was enacted twenty years ago and was in full force and effect until the adoption of prohibition by the State of Ohio.

Section 6201, G. C. One-third of the amount recovered in the action in question to be retained by the person causing the action to be begun and prosecuted, the balance to be paid into the county treasury.

Section 12874. The fine to be for the use of the owner of the property or effects embezzled, the fine being double the amount of money or other property embezzled.

Section 12971. The fine in question to be paid to the Society for the Prevention of Cruelty to Animals.

Section 13247. This section is the forerunner of the section involved in the instant case, providing for the payment of one-half the fines to the State, and the other half to the political unit whose magistrate tries the case. This section, however, provided that all the fines, instead of one-half, should be paid to the treasurer of the municipal corporation in whose municipal court the fine was enforced. This was passed eighteen years ago and was in effect until the State prohibition law was passed.

That the same practice in the division of fines has been followed in other jurisdictions, note the following:

United States

U. S. Comp. St. 1918, Section 377. One-half of penalty of $3,000 to informer.

Sections 6309, 8246, 8268, 8275, 8276, 9921, 9933. One-half of fine to informer.

Sections 10153, 10175. One-half of fine and forfeiture to informer; one-half to United States.

Section 4246. Not to exceed 50% of fine to informer.

Sections 5889, 10427. One-half of fine to United States; one-half to informer.

Section 5794. One-fourth of fine to United States; one-fourth to officers of customs, and remainder to officers of revenue cutter; or one-half to United States, one-fourth to informer and one-fourth to be divided between collector, naval officer and surveyor.

Section 5841h-39, 1925 Supp. U. S. Compact. 25% of the net amount of fines, penalties or forfeitures recovered, but not to exceed $50,000 in any case, to be paid to the informer.

The following sections of laws from the various states shows that this policy is general:

California—General Laws 1923, Act 57, Sec. 21. Penal Code 1923, Derring, page 135, Sec. 273c. 590 Penal Code. People vs. City of San Bernardino, 190 Pac. 482, (Cal. App.)

Connecticut—General Statutes 1918, Sec. 2970. Sec. 2956. Sec. 2712. Secs. 3285 and 6301. Sec. 2280. Sec. 2281. Sec. 2317.

Colorado—Sec. 1587, Compiled Laws of Colorado, 1921. Sec. 6867. Sec. 4764.

Delaware—Sec. 3 of Chapter 35, Sec. 954, Revised Code 1915. Sec. 2475. Sec. 2418. Sec. 2344. Sec. 2213. Sec. 906. Sec. 946. Sec. 2202. Sec. 2529. Sec. 2537. Sec. 2540. Sec. 2369. Secs. 2239, 2408, 2424, 2425, 2463, 2464, 2467, 2468, 2471, 2474, 2486, 2537 and 3459. Sec. 2272. See Law and Order Society vs. Mayor, etc., City of Wilmington, 55 Atlantic 1. Sec. 2245.

Illinois—Chapter 114, paragraph 94.

Kentucky—Carroll's Kentucky Statutes 1922, Sec. 190. Kentucky Statutes 1922. Sec. 3360. Sec. 124, page 61. Sec. 2290.

Louisiana—Act 55 of 1914, paragraph 139. Act 109 of 1892, paragraph 142. Constitution and Statutes of

Louisiana, page 746. Act 32 of 1892, paragraph 39, page 747.

Maine—R. S., Chapter 127, Sec. 25. R. S., Chapter 128, Sec. 15. R. S., Chapter 129, Sec. 15. R. S., Chapter 129, Sec. 33.

Maryland—Article 38, Sec. 2. Article 38, Sec. 4. Article 23, Sec. 383. Article 33, Sec. 121. Article 27, Sec. 33. Article 34, Sec. 19. Article 39, Sec. 77. Article 27, Sec. 176.

Massachusetts—Chapter 280, Sec. 2. Chapter 266, Sec. 135. Chapter 266, Sec. 134. Chapter 272, Sec. 84. Chapter 148, Sec. 60. Chapter 269, Sec. 38. Chapter 266, Sec. 9. Chapter 130, Sec. 99. Chapter 266, Sec. 133. Chapter 175, Sec. 160. Chapter 97, Sec. 1. Chapter 149, Sec. 98. Chapter 101, Sec. 14. Chapter 87, Sec. 12. Chapter 161, Sec. 97.

Michigan—Chapter 261, Sec. 9 (15564).

Minnesota—Session Laws 1923, Sec. 3226, General Statute 1923.

New Hampshire—Public Statutes and Session Laws of New Hampshire, Chapter 269, Sec. 11. Chapter 257, Sec. 2.

New Mexico—New Mexico Statutes, Sec. 888.

Pennsylvania—Sec. 10857. Sec. 6390. Sec. 10952. Sec. 2662. Sec. 21370. Sec. 11746. Sections 899, 7718, 7739, 7745, 7772, 10534, 14545, 16257, 16260, 17415, 17632.

Rhode Island—Cities and towns where misdemeanor occurred receive one-half of the fines in such liquor cases.

Tennessee—Sec. 260, Shannon's Annotated Code.

Utah—Laws 1919, Chapter 34, Sec. 1.

West Virginia—Chapter 54, Sec. 61, Barnes West Virginia Annotated 1923, page 1164. Chapter 151, Sec. 1, page 2766.

Wisconsin—Page 205, Laws of Wisconsin 1925.

We have filed with the clerk a digest of these sections for the convenience of the Court if they are needed.

COLLECTION OF COSTS BY THE TRIAL COURT UPON CONVICTION ONLY, IS PRECEDENTED, GENERALLY SUSTAINED AND THE AUTHORITY FOR IT IS LEGISLATIVE.

On page 7 of Supplemental Brief of counsel for Mr. Tumey they say, "the receipts by the mayor of his fees, only in the event of conviction, is unconstitutional." As we pointed out in our argument and other brief, there were no provisions for fees at common law.

It was said that it was considered beneath the dignity of the Crown either to accept or to pay costs. Obviously then, the modes and usages of the common law cannot afford a test to determine whether the law of the land comprehends a trial by a magistrate whose fees are paid from the costs taxed against the defendant upon conviction.

But this system was invoked in American jurisprudence at least shortly after the independence of the Colonies. In fact, as early as 1692, by the colonial laws of Massachusetts fees were established in the case of justices of the peace in civil and criminal cases, the Act requiring that a list of the fees be hung up in the several offices and that the officer make out a particular account of his fees in writing if so requested by the party paying them. 5 Dane's Abr. Amer. Law, 198, 199. So also in the case of the Kentucky Fee Bill of 1800. Ibid., 198. In Massachusetts in all criminal cases where the accused is acquitted the State does not pay costs, but where he is convicted he is adjudged to pay costs in all cases, except where there is a judgment of death or where the costs are included in the forfeiture. 6 Dane's Abr. Amer. Law,

563. Legal costs have ever been regulated by fee bills varying from time to time according to the circumstances. Ibid., 564. Likewise in Kentucky the matter is covered by a general fee bill. Ibid., 585.

The payment of costs to the magistrate by the defendant upon conviction only is such due process of law as conceived by the early colonists and the States after their Declaration of Independence. In fact, only in Bennett v. State, 4 Tex. App. 72; Wellmaker v. Terrell, 3 Ga. App. 791; Pace v. City of Hazelhurst, 9 Ga. App. 203; and Longston v. City of Hazelhurst, 9 Ga. App. 499 (so far as our search as disclosed) has the question ever been raised that the payment of costs under these circumstances disqualifies the judge on the ground of interest; and in each of these cases it was decided that there was no disqualification. Only in one case—Herbert v. Baltimore County Commissioners, 97 Md. 639; 55 Atl. 376—has it ever been contended that the payment of costs under these conditions operates as a denial of due process of law resultant upon the alleged disqualification of the magistrate; and in this case the contention was denied.

This practice has been established under statute law. Consequently, if a magistrate can not assess fees against any one or be otherwise provided with compensation in case of an acquittal, it is because of absence of a positive statute giving fees or the presence of a statute denying the same. In either event, such would be in accordance with the common law so far as the right to collect fees in case of an acquittal is concerned. How then could such condition be made a basis for a claim of unconstitutionality?

If this claim of unconstitutionality by opposing counsel is correct, then in the case of every misde-

meanor tried by a mayor in Ohio for the last half century, the mayor has exercised an unconstitutional jurisdiction. The same thing could be said in a number of other states, where as it will be seen, similar conditions exist. Upon acquital, only a part of the costs were paid or a lump sum is given in lieu of costs as follows:

Ohio—Section 3019. Justices of the peace in place of fees allowed by the county commissioners aggregate amount not to exceed $100. (Under Section 4550 a mayor is entitled to receive the same fees as a justice of the peace.)

Mississippi—Paragraph 10, Section 1, Chapter 165, Laws of 1922. Fees in case state fails a sum not to exceed $60.00 to be paid out of the county treasury. In such instances as the above, it is evident that if the fees earned according to the schedule were more than the lump sum allowed, therefore, the magistrate received a smaller amount than he would have received if the defendant had been convicted and the costs paid.

Virginia—Section 3504, General Laws of Virginia 1923. In case of acquittal only one-half of prescribed fee in case of a justice of the peace, constable, etc., paid out of state treasury but with restrictions and limitations, and in case of law enforcement officer for making arrests, summoning witnesses and mileage.

Alabama—Section 4039, Code of Alabama 1923. When there is a surplus in the fine and forfeiture fund in the county treasury over and above witness fees, the surplus to be applied to payment of fees of officers in case of an acquittal and the costs not imposed upon the prosecutor. See Bilbro vs. Drakeford, 78 Ala., page 318.

The following State laws provide for cost only in case of conviction:

Arkansas—"Magistrates or Mayors of towns and villages under our Statutes receive no compensation or fees in misdemeanor cases where the defendant is acquitted." See Sections 4599 to 4604 of Crawford and Moses' Digest. (Letter from Attorney General of Arkansas.)

Kentucky—"Carroll's Kentucky Statutes (1922) Section 1760. No officer shall be entitled to a fee in a proceeding or misdemeanor, unless same is recovered and collected from defendant."

Nebraska—"Complied Statutes of 1922, Section 10168. No costs, unless defendant convicted."

North Carolina—"Section 1271 of the 1919 Consolidated Statutes holds Mayors courts not entitled to costs if the defendant is acquitted in criminal action, but prosecuting witnesses to pay costs in cases brought without probable cause."

Texas—"Criminal Statutes 1925, criminal procedure, Article 1066, page 176, Justice of Peace is not allowed costs in case of acquittal."

Oregon—"Statutes of 1864, Section 90 and 91, under Criminal Actions, made no provision for costs for Justice of Peace and minor courts in misdemeanors, unless fees could be collected from the prosecutor if action was brought maliciously."

Illinois—"Laws of 1867, page 113, provides no fees for magistrate or Justice of the Peace in misdemeanor cases where defendant acquitted."

Alabama—"Court decision (1884). No provision to fees to officer of courts in criminal cases where de-

fendants are not convicted. Bilbro vs. Drakeford, 78 Alabama, page 318."

Many other states that now provide for payment of fees to minor courts in case of acquittal, formerly made no such provision.

Ohio—Section 13499. In a misdemeanor, a magistrate can demand security except when the complainant is an officer such as sheriff or marshal.

Alabama—Sections 3833 and 8684, Code of Alabama, 1923. In case of misdemeanors if court is of opinion prosecution is frivolous or malicious, then the prosecutor is liable for costs.

California—Section 1447, Penal Code 1923 (Deering). If defendant is acquitted and prosecution malicious or without probable cause, prosecutor may be ordered to pay costs or give security.

West Virginia—Section 33, Chapter 137, Page 2512, Barnes West Virginia Code Annotated 1923. If there is no conviction, county in no event pays the fees, but person making complaint before a justice of the peace must pay the fees.

Section 3, Chapter 158, Page 2803. Judgment may be given against prosecutor in case of dismissal of case or discharge of accused.

Indiana—Opposing counsel says that the secretary of the Legislative Bureau reports that justices of the peace receive fees whether the defendant is convicted or not. In the case of Miami County vs. Blake 21 Ind. 32, it was said:

> "At common law, then, the officers depend upon the parties for their fees, except the State, which they nominally serve gratuitously, but in reality get their pay, because the State fixes the rate of fees they charge private parties so high as to compensate them, in their aggregate receipts, for their services in State cases, where there are acquittals; and this is what is meant when it is said that officers take their offices cum onere, and the constitutional provision touching services without compensation does not apply to such."

An act, cited in above case, of 1855, Sec. 25, page 113, reads:

> "In all criminal prosecutions, when the person shall be acquitted, no costs against such person nor against the State or county, for any services rendered in such prosecution by any clerk, sheriff, coroner, justice of the peace, constable or witness, but in all cases of conviction, such fees and costs shall be taxed and collected as in other cases, from the person convicted."

The same provision is Sec. 6027 R. S. 881; cited in Ex parte Harrison, 14 N. E. 225; 112 Ind. 329, in 1887. If the law of Indiana has been changed it has been by the Legislature and not by judicial decision.

Questioned only five times in the history of the reported decisions since the beginning of our Government, this procedure has been upheld and acquiesced in to such an extent that it has become due process of law under the conditions which were suited to our political and civil Government.

That this procedure is not now followed in more of the States of the Union is a concession that the objections to this system should be, and have been, in-

corporated in political arguments addressed to the legislative bodies of the various States, and that the question is not a judicial one to be addressed to the courts. While the trend of legislation is towards providing payment of costs in cases of acquittal as well as conviction, yet in every instance so far as we can find, this authority is held to rest with the legislature and not with the Courts.

SIZE OF FINES SHOULD BE OF SUFFICIENT DIMENSIONS TO CURB ORGANIZED OUTLAWRY.

The claim is made that the fines under Ohio's Prohibition Law are stringent beyond anything known to that state's law before. If that statement be correct, the answer is that the organized commercial violation of that law is beyond what has been known before. Legislatures, executive officers and courts must accept the challenge of organized lawlessness.

Fines that are effective must be larger than formerly. Liquor law violators are organized and take long chances. Small fines, such as were formerly imposed, would be but a license fee to the bootlegger and rum runner to continue in business. As a matter of fact, where small fines are imposed, liquor dealers use it as a means of advertising their business. They can not advertise through the papers, nor in any other way, but the report of their being fined with a small fine indicates to those who desire contraband liquor where they may get their supplies. The fines imposed even under this new statute, are larger than formerly, but are still smaller than fines imposed for first offenses under the old Revenue Laws. These penalties were imposed upon liquor law violators who were in

competition with regular retail liquor dealers and reflect the ideas of those who at that time wanted to put the speakeasy keeper and the rum runner out of business. Certainly there can be no objection to similar fines being imposed today when we are trying to prevent similar law breakers from violating the Constitution.

A court's answer to a claim of excessive fine is found in Hayner v. State, 83 O. S., 178, at 196 and 197 as follows:

> "The fines prescribed are larger than in many other sections of the liquor laws, but is it shown that punishment of less amount would prove effective? We think not. The answer of counsel for the state appears to fully meet this objection. In substance it is that, as matter of common knowledge, the profit in the wholesale dealing in liquor is so great that a small fine would utterly fail to prove a deterrent, inasmuch as the dealers could easily afford to pay such fine and continue the soliciting of orders. The subject is clearly a matter of legislative discretion with which the courts should not interfere unless the punishment is so excessive as to amount to cruelty or confiscation, which clearly is not the case here."

If the village were interested only in the fine and the the money resulting from these cases it would adopt an ordinance that imposes large money penalties and keep all of the fines secured from the prosecution of violators of the liquor law. The Supreme Court of Ohio held, in the case of Alliance vs. Joyce, 30 N. E. 270 (49 O. S. pg. 7) that a municipal ordinance might impose a greater penalty than is specified in the state law. In these state cases also, if the violators are residents of the village only half of the penalty goes to the village or municipality.

Furthermore, there is precedent for heavy fines in Ohio and, under the old Revenue Laws, in the United States:

Ohio.

Section 1454, G.C. Poisoning fish or interfering with game protector, $100 to $500, to stand committed if not paid and no parol.

Section 12647, G. C. Throwing refuse into stream, $50 to $1,000.

Section 12775, G. C. Failing to label canned fruit or vegetables, $50 to $1000.

Section 12777, G. C. Failing to label "soaked" goods, $500 to $1000. Many other Ohio statutes provide similar penalties. See Sections G.C. 12887—12914—12923—12924-9—12924-10 and 13405.

UNITED STATES STATUTES.

Section 3252, R.S., prevents adding substances to create a fictitious proof. The fine is $100 minimum and three months; maximum, $1,000 and two years.

Section 3257, where a distiller attempted to defraud on any tax on spirits there was a minimum fine of $500 and six months in jail, a maximum of $5,000 and three years.

The following sections R.S., 3258, 3259, 3266, 3268, 3269, 3281, 3282, 3294, 3305, 3306, 3317, 3318, 3326, and 3330, provide similar penalties for violation of the Revenue laws, relative to the illegal manufacture or distribution of intoxicants.

Effect of Fines on Trial Court.

It is also claimed that the power to assess a fine from one hundred to one thousand dollars is a strong

appeal to cupidity. Although a small fine such as assessed in the instant case does not in itself show cupidity, yet the claim of cupidity by opposing counsel does not harmonize with their claim (page 17, supplemental brief) as to long imprisonment in jail in default of payment of heavy fines. A magistrate moved by cupidity would not be so apt to assess a fine so heavy that the accused could not pay it as would a magistrate moved with a desire to break up outlawry.

Also, if cupidity were the motivating influence operating upon a magistrate, he would not be anxious to keep the accused in jail there committed in default of payment of fine as intimated by opposing counsel on page 17 of their brief, where it is insinuated that the accused has small chance of release when recommendation of "the financially interested mayor" is necessary to effect such release. Certainly a mayor with a palm itching for his town or officers would want the accused released when under Section 12382, G.C., he must agree to pay his fine in installments or otherwise to secure his release; for thus the village and secret service men would receive, though slowly, their respective shares of the fine.

Commitment for Non-Payment.

The procedure complained of committing the defendants in this case to the workhouse or jail for non-payment of fines is precedented and has been upheld except where no provision was made for working out the fine in case the law violator had no money. This is not the situation in Ohio because the law provides that in any such case the offender may work out his fine at the rate of one dollars and fifty cents per day. Furthermore, as seen below, one so committed to jail may be paroled.

The sections, viz., 13717 and 12387, G.C., authorizing commitment in default of payment of fine do not apply especially to prohibition law violators. They apply generally to all offenses and are of long standing. The history of the former runs back to 1863 and the latter to 1883. As found at present, they are respectively as follows:

> "When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of one dollar and a half per day for each day's imprisonment."
>
> "In cases where a fine may be imposed in whole or part in punishment of an offense, or for a violation of an ordinance of a municipality, and such court or magistrate could order that such person stand committed to the jail of the county or municipality until the fine and costs of prosecution are paid, the court or magistrate may order that such person stand committed to such workhouse until such fine and costs are paid, or until he is discharged therefrom by allowing a credit of one dollar and a half per day on the fine and costs for each day of confinement in the workhouse, or until he is otherwise legally discharged."

There are, however, special statutes in Ohio authorizing commitment in default of payment of fine. Note, for instance, Sections 1454 and 12600-280, G.C. Under the former, the maximum fine is $500 and there is no release unless the fine be paid or be discharged at the rate of only one dollar per day. The maximum fine under the latter statute is $1000. This can be discharged under Section 13717, G.C., at $1.50 per day.

Also under federal statutes, commitments are made in default of payment of fine. See Section 4137 U. S. Comp. St., 18.

The power to commit in default of payment of fine exists without statute when common law jurisdiction is entertained, but when offenses are statutory, then such power must be given by statute. Brown v. State, 11 Ohio, 281; Bonsal v. State, 11 Ohio, 72; Lougee v. State, 11 Ohio, 68. However, statutes providing for such commitment have been held constitutional in Ohio in Matter of Beall, 26 O.S., 195, and in practically all other jurisdictions.

Finally, one committed to jail in default of payment of fine can be paroled under Section 12382, G.C., upon recommendation of trial court and sheriff, if he will sign an agreement to pay fine in installments provided such agreement is approved by prosecuting attorney.

THE EMPLOYMENT OF DETECTIVES, ETC., FROM FINES IMPOSED, IS SUPPORTED BY PRECEDENT AND ON CONSTITUTIONAL GROUNDS.

It is claimed that the hiring of detectives, solicitors, or other officers in the municipalilty from fines collected is unprecedented.

The policy of giving rewards and special fees to prosecutors and witnesses in case of conviction is as old almost as the Constitution itself.

This policy has been in vogue in Ohio since 1909, when the prosecuting attorney was authorized under Section 6184, G.C., to employ secret service officers. See also Sections 2915-1, 3004 and 3004-1, G.C.

The stamp of approval of Ohio courts has been put

upon the use of detectives in Hinkleman v. State, 13 Ohio Circuit Court (New Series), 321, 328, as follows:

> "In the prosecution of crime, it is often necessary to rely on *detective evidence,* the evidence of men, who for a time conceal their true characters and circumstances, and do this deliberately for the purpose of misleading those who are suspected of crime. This is necessary because evidence of past crimes is always difficult to obtain and because no one intending to commit a crime or an offence against the law, will do so in the presence of any one who is known to be law abiding and unfriendly to the commission of that crime or offense. It is also necessary because few citizens are willing to incur the ill-will of their neighbors by reporting their violations of law and exposing them to punishment. Such exposure must come generally from strangers."

This case was affirmed by the Supreme Court without report, 83 O.S. 446.

Statutes authorizing payment of a portion of fine to informers and the like have been held repeatedly to be constitutional. State v. Wabash, etc., R. Co., 89 Mo. 562; Sutton v. Phillips, 116 N. Car. 502; So. Express Co. v. Com., 92 Va. 59.

16 Amer. and Eng. Encyc. of Law, p. 324, is authority for the following:

> * * * "it has been held that the legislature in imposing penalties for violation of its laws, may in its discretion, for the purpose of securing the enforcement of its laws and the collection of the penalties imposed, give a part to the informer."

THERE BEING O'THER COURTS AVAILABLE DOES NOT DEPRIVE MAYOR OF JURISDICTION IN INSTANT CASE.

It is claimed that there are other courts open in Hamilton County and that the case might have been tried there.

This may be true, but it does not deprive the Mayor's court of College Hill, which has jurisdiction in these cases, of the right to try the case when it was properly brought before it. It might be that as in similarly situated places, some of the other courts were not inclined to prosecute these liquor cases. Wherever the city courts and the other courts in the county do their full duty there is no inclination to take these cases outside. But where they fail and there is a court with competent jurisdiction outside that will try the cases, it is not only proper but better for orderly government that this shall be done than that lawlessness be protected and the law flouted. President Coolidge was right when he said that "a government that does not enforce its laws is unworthy of the name of government, and cannot expect to hold either the support of its own citizens or the respect of the informed opinion of the world."

Besides, the very statute, viz., Sec. 6212-18, G.C., that gave the Mayor of College Hill jurisdiction identical with that given in Section 4536, G.C., *supra,* also gave the other courts named in Section 6212-18, G.C., similar jurisdiction. Consequently, the jurisdiction of the Mayor is no less constitutional than that of the other magistrates named therein. The difficulty is that especially the common pleas courts are sometimes averse to exercising the jurisdiction given thereunder.

MAYOR GENERALLY HAD COUNTY-WIDE JURISDICTION BEFORE ENACTMENT OF PROHIBITION LAW.

It is claimed that a mayor did not have county-wide jurisdiction before the prohibition law was enacted. Even if so, what has that to do with the constitutionality of the statute giving him and other magistrates such jurisdiction? But, opposing counsel is in error except as to Hamilton, Franklin, Montgomery, Butler, Stark, Erie, Lucas, Muskingum, Licking, Scioto and Summit Counties, eleven out of a total of eighty-eight.

As hereinbefore recited, special municipal court acts cut down the jurisdiction of mayors and justices of the peace outside of the cities to which these respective acts applied. Section 6212-18, G.C., simply restored the jurisdiction in liquor cases thus taken away, which mayors had possessed for a half century or longer as previously herein discussed. It is interesting to note that special municipal court acts passed since the enactment of the prohibition law have preserved by exception the county-wide jurisdiction of mayors in the enforcement of the prohibition laws. This shows the attitude of the state legislatures of Ohio.

This matter has been more fully discussed under that part of this brief dealing with the right of the legislature to establish a mayor's court and give it jurisdiction, and showing that such was well supported by precedent.

SIZE OF FINE FIXED BY LEGISLATURE DOES NOT TAKE AWAY JURISDICTION CONSTITUTIONALLY GRANTED A MAYOR.

Opposing counsel attempt to differentiate between small and large fines in their effect on mayors and judges. The legislature has the power to fix the fine and to establish the mayor's court and give it jurisdiction. It would then seem strange to say that if the fine were small, jurisdiction would exist, but if the fine were large, it would vanish.

The test in these cases is not the size of the fine or whether it added to the material prosperity of the village. The crux of the controversy is, did this plaintiff in error have a fair trial and was he properly convicted without violating the State or Federal Constitution? The State Supreme Court held that no state constitutional provision was violated, and we contend that plaintiff in error has not shown any Federal guarantee that has been violated. As a matter of fact, plaintiff in error does not at any point claim that he did not violate the state law, but that in some way the laws under which he was convicted for violating the state law and the state Constitution deny him certain guaranteed rights. Not only was the procedure in the Mayor's court regular, and not only has it been upheld by the reviewing courts of the state, but he has been given full opportunity to have his case presented on review on the weight of the evidence in the Common Pleas Court and in the Circuit Court of Appeals and then on a question of law in the State Supreme Court. If in the trial court the record showed bias or prejudice or interest materially affecting the rights of the accused in the particular case, then such matters could have been reviewed on error.

Courts of Common Pleas and Courts of Appeals Must, and the Supreme Court May, Weigh the Evidence.

Mr. Tumey's counsel, though, claim, as appears on pages 4 and 5 of their supplemental brief, that "the size of the fines and the weight of evidence can not be reviewed. Only errors of law are reviewable in error proceedings." In this they are clearly mistaken.

Section 6565, R.S., now Sections 10359, 10360, 10361, 10362 and 10363, G.C., and Section 7356, R.S., now Section 13751, G.C., cover the question of the review on the weight of evidence. Sections 10359, 10361 and 13751, G.C., are respectively as follows:

> 10359. "*In all cases before a* justice of the peace, *mayor* or police judge, *whether tried by jury or* the justice, *mayor* or police judge, either party shall have the right to except to *the decisions of the* justice, *mayor* or police judge, upon any matters of law arising in the case."

> 10361. "* * * But when the * * *, exception is to the decision of the court on a motion * * * for a new trial because the verdict, or if a jury is waived, *the finding of the court is against* the law and *the evidence,* or on the admission or rejection of evidence, the party excepting must reduce this exception to writing, and present it to the trial justice, *mayor* or police judge, or his successor, within the time above limited."

> 13751. "*In a criminal case,* including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court; a judgment or final order of a court or officer inferior to the court of appeals may be reviewed in the court

of appeals; and a judgment or final order of the court of appeals in convictions of a felony or the common pleas court in conviction of a felony or misdemeanor, and a judgment of the court of appeals involving the constitutionality of a statute; or a judgment in a case of public or great general interest may be reviewed by the supreme court. *The supreme court in a criminal cause or proceeding,* except when its jurisdiction is original, *shall not be required to determine as to the weight of the evidence."* (Underscoring ours.)

Section 10359 and the following sections apply to "all cases" both civil and criminal. State v. Ransick, 62 O.S., 283.

It will be noted that Section 10361 provides for an exception in case of a motion for a new trial because the finding of the court is *against the evidence* as well as also against the law.

Section 13751 provides for error in criminal cases and by it Common Pleas Courts, Courts of Appeals and the Supreme Court have error jurisdiction. The last sentence provides that "the Supreme Court in a criminal cause or proceeding, * * *, shall not be required to determine as to the *weight of the evidence.*" From this section, it is thus seen that the Supreme Court may review on the weight of the evidence, and a Common Pleas Court well holds in Kimmerline v. State, 5 O.N.P. (N.S.), 417 at 420, that "from the fact that by this section, the Supreme Court is exempted from passing on the weight of the evidence, *it is the duty of all other courts to consider it.*" One of the grounds of error in this case was, as appears on page 418, "that the judgment was against the evidence." A portion of the second branch of the syllabus in this case is as follows:

"When a proper bill of exceptions embodying the testimony is allowed, signed and filed with the petition in error, it is the duty of the court of common pleas to pass upon the *weight of the evidence.*"

This question was before the Supreme Court of Ohio in Koch v. State, 73 O.S., 131. After quoting and commenting upon the sections above cited, the Court then on page 139 said:

"[*The circuit court erred in not reading and considering the bill of exceptions on the weight of the evidence,* for which error in its judgment is in part vacated, and the cause remanded to the circuit court with directions *to read and consider the bill of exceptions as to the weight of the evidence* and pass judgment upon the same."

See also memorandum opinion in State v. Martin, 87 O.S., 459.

In Datesh et al. v. State, 23 O.N.P. (N.S.), 273, affirmed by the Court of Appeals, is collated a number of cases showing when a judgment may be reversed on the weight of evidence. Under this decision and the decisions cited, the judgment may be reversed when it "is manifestly against the weight of the evidence"; when it "is so clearly unsupported by the weight of the evidence as to indicate some misapprehension, or mistake, or bias on the part of the jury, or a wilful disregard of duties.

As above pointed out, under Section 13751, G.C., the Supreme Court in a criminal case could weigh the evidence if it wished to do so although it can not be required to do so. In practice in Ohio it does not do so, and yet, as seen from Ford v. Osborne, 45 O.S., 1, on

page 3, the Supreme Court may "look into the Record to determine whether there is any evidence tending to support the issue." Consequently, if Tumey should make the claim that there was nothing in the Record to support the judgment of conviction, such would be a matter to determine which the Supreme Court would look into the Record.

Reviewing Courts in Ohio Will Consider Whether or Not a Fine is Excessive.

In Lynch v. State, 16 N.P. (N.S.), 167 at 168, the court said:

> "As to the fine assessed against the plaintiff in error in this case, the court thinks that, under Section 13195 of the General Code, the mayor had the right to fine the plaintiff in error in the sum of $500.00. The statute says he shall not be fined less than $100.00 nor more than $500.00. The fine of the mayor in this case is not beyond the limits of the statute."

Paragraph 3 of the syllabus in Phillips v. State of Ohio, 4 N.P. (N.S.), 398, is as follows:

> "A fine of $50.00 for failure to conform with the requirement as to the keeping on hand of goods for thirty days is not excessive or an abuse of discretion on the part of the trial court."

Not only will a reviewing court consider an excessive fine, but it will reverse and remand as is seen from Shomberg v. The State, 30 O.C.A., 382, 14 O.A., 26. Paragraph 2 of the syllabus is as follows:

> "A fine of $200.00 for a first offense in such a case is grossly excessive, and a reviewing court, while affirming the judgment, will send the case back with the suggestion that justice be done in the premises."

Even the Supreme Court will consider whether or not a fine is excessive, as is seen from Hayner v. State, 83 O. S., 178. On page 196 is found the following:

> "It is further contended that the act is invalid because violative of the Constitution in the imposition of excessive fines. The fines prescribed are larger than in many other sections of the liquor laws, but is it shown that punishment of less amount would prove effective?"

Wherefore, if the conviction were wrong Mr. Tumey could have had it reversed on the weight of evidence. The fine, however, was clearly not excessive, being the minimum of one hundred dollars.

TERRITORIAL JURISDICTION OF MAGISTRATE NOT DETERMINED BY LIMITS OF POLITICAL SUBDIVISION IN WHICH ELECTED.

It is contended that the mayor elected in the village who exercises jurisdiction outside has no political responsibility to those outside the municipality and therefore the procedure is invalid.

The procedure in the trial court does not depend on the unit that elects him. In many states the judges who try these cases are not elected at all but are appointed by the governor. In Ohio, for instance, a common pleas judge elected in one county has jurisdiction in any other county of the state. As an illustration, a

judge elected in Vinton County among the hills with a population of 12,000 or 15,000 may pass upon the rights of people of Cuyahoga County in which is Cleveland and in which there are one million or more people not one of whom would have had a word to say about the election of the Vinton County Judge.

Such jurisdiction, though, is what the Legislature has determined, subject, of course, to limitations named in the state Constitution, if any. Justices of the peace are elected in townships usually but they generally have jurisdiction throughout the county, in certain cases fixed by the Legislature.

In that part of this brief dealing with the question of the grant of jurisdiction to mayors, we there pointed out how in numerous states mayors and justices of the peace elected by a town, township, district or village, had jurisdiction throughout the county in which such town, township, district or village was located. Strange it would be now to say that after years of such widespread jurisdiction, such jurisdiction is not contitutionally exercised.

MAYOR NOT FINANCIALLY INTERESTED SO AS TO DENY JURISDICTION.

The mayor is given jurisdiction throughout the county in state cases where imprisonment is not part of the penalty. This has been the procedure in Ohio for many years. In many other states either the mayor or the justice of the peace have been given similar jurisdiction. The mayor in Ohio is elected as an executive officer with certain judicial powers. He is given, usually, a small salary. Outside of the honor it is to be chosen as the chief officer of the village, his work is neither financially attractive nor alluring.

Opposing counsel in their argument have imputed motives to the Legislature and to these officers that are not justified. Plaintiff in error says, "The Legislature plainly intended this result to follow as a means of stimulating the activity of the mayors court machinery. The mayors thus became money-dominated and lost their constitutional integrity.

There is no basis for impugning either the motives of the Legislature or of these officers who are trying to uphold orderly government and to enforce the law. Besides, it is said in Wagner v. City of Milwaukee, 192 N. W., 194, as follows:

> "The motives which may prompt a legislative body to act in any particular way within its powers is not within the field of judicial scrutiny either as to such subordinate legislative bodies as common counsels or legislature."

See also State v. Clausen (Wash.), 183 Pac., 115.

A village mayor in any of these counties in close proximity to large cities who tries liquor cases finds them more of a liability than an asset. It sometimes causes the opponents of the law to array themselves against him politically and financially. It often means assault and in some cases assassination. These mayors are not hunting opportunities to try liquor cases brought to them from outside the village, especially near the large cities where the outlawed liquor traffic is organized and defiant of the law. There is little incentive for a mayor to become unduly active in the enforcement of the prohibition law in these cases because of the political and other influence he faces in his county.

CASES CITED BY PLAINTIFF IN ERROR DIFFERENTIATED FROM THE INSTANT CASE.

Meyers vs. Shields, 61 F. 713 (Page 13). We will let the court itself make the differentiation between that case and cases such as the instant case as found on page 726 as follows:

> "It is not a sufficient answer * * * to say that courts have upheld laws which are administered by officers and judges who are interested in the fees which flow from proceedings instituted and conducted by them. In reply to this very serious and grave objection to such an interested officer deciding a case of a judicial nature, the Supreme Court of Ohio has said that a justice of the peace and a probate judge are likewise interested, because the security of their fees as taxed by law may depend upon the results of the suit which they are to decide. The comparison, while in some respects apparent, loses all force when we come to consider it in detail, the magistrate or probate judge has the same fees taxed for his compensation which is usually but a small part of the judgment rendered is assured if he is diligent; and its amount is not contingent upon the decision he makes. The case is therefore exceptional when the security of his compensation depends upon the party against whom his judgment is rendered. But, as we have seen, the auditor's compensation is directly dependent upon the finding he makes. * * *.
>
> Not only is he interested in finding against the taxpayer, but his fee grows with the increased amount of his assessment. * * *. The fee is evidently not intended to be given in the nature of a compensation for services alone. It is therefore not only in the nature of a bribe to decide against the citizen, but a corrupting inducement to make his finding the largest possible."

Day v. Savadge, Hobart, 87 (Page 16). The Mayor of London passed upon the merits of the question of a custom as certified by him.

City of London v. Wood, 12 Mod. 669 (Page 17). The Mayor of London heard an action brought in the name of the said mayor and aldermen.

Grand Stahl v. Board of Supervisors, 187 Iowa 1342 (page 9). One of the Commissioners owned land in a drainage district, which, in case of flood, was all subject to overflow.

Commissioners v. Smith, 233 Ill. 417 (Page 10). One of the commissioners owned land in the District which would be materially benefited by the establishment of a drainage district.

Landfear v. Mayor, 4 La. 97 (Page 18). Ordinance permitted mayor to forfeit and sell property left on the levy contrary to the ordinance without a trial. The officers could have resorted to the courts to recover a fine imposed for violation of ordinance.

Pierson (*Pearce*) *v. Atwood,* 13 Mass. 324 (Page 18). Case was tried in township where the offense was committeed, the township receiving the fines. If the case had been tried in another township, such township would not have received the fines. In the instant case wherever it would be tried, the political unit where tried would receive a portion of the fines.

Gregory v. Railroad, 4 O. S. 675 (Page 18). Two of the judges appointing appraisers to fix damages against a railroad for land appropriated were stockholders in the railroad company.

State v. Young, 31 Fla. 594 (Page 19). The trial judge was one of the vestrymen and under the act of the incorporation of the church, the judge as such vestryman would be invested with the property bequeathed to the church under the will.

Nettleton's Appeal, 28 Conn. 267 (Page 19). In an application for the appointment of a conservator for an "incapable person," the probate judge to whom such an application would be made, as a selectman of his town was made a party to the application.

Dimes v. Grand Junction Canal, 3 H. L. 759 (Page 19). The Lord Chancellor was a shareholder in a company that filed a bill in equity before him against a land owner.

Moses v. Julian, 45 N. H. 52 (Page 19). The judge before whom a will was probated had written the will and counselled and advised with the testator.

Stockwell v. Township, 22 Mich. 341 (Page 20). A member of a board of commissioners hearing ouster proceedings against the plaintiff in error was a party whose order for money the plaintiff in error refused to countersign and who was benefited directly by a favorable action of the commissioners.

State v. Crane, Collector, 36 N. J. L. 394 (Page 20). The land of one of the road commissioners was located on the road laid out and was benefited by it. His interest "was not as a general taxpayer, but peculiarly personal."

Stuart v. Commonwealth, 91 Va. 152 (Page 20). The judge as an attorney in fact for another party signed that party's name to a bond which the judge himself had to approve in a transaction made before his court and so had to pass upon his own credentials as attorney.

Findley v. Smith, 42 W. Va. 299 (Page 20). The judge was assignor of a judgment previously assigned to him, to enforce the lien of which against the real estate of the present assignee suit is now brought before the judge.

State v. Seattle Board of Education, 19 Wash. 8 (Page 21). A member of the school board caused charges to be preferred against a school superintendent and declared he would vote against the superintendent whatever the evidence. No appeal would lie from the decision of the board.

Ex parte Cornwell, 144 Ala. 497 (Page 21). The judge claiming a right to hear a charge of embezzlement was a depositor in a bank from which the defendant was alleged to have embezzled, the bank having been thrown into a receivership.

Yazoo R. R. v. Kirk, 102 Miss. 41 (Page 21). Attorneys for plaintiff in error were respectively the judge's brother-in-law and son.

DUE PROCESS OF LAW

A party has no interest to assert that a statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. "His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of a constitutional right."

Castillo v. McConnico, 168 U. S. 680.
Straus v. Foxworth, 231 U. S. 162
New Orleans v. New Orleans Water Works, Co., 142 U. S. 88.

Mr. Tumey fails to point out wherein he has been denied due process of law in this case. He was duly tried and convicted and allowed a review on the evidence in two reviewing courts and on the law in three courts. He does not deny his guilt. He complains about the large amounts of fines that may be assessed,

but in this case he was assessed the minimum fine and was not, therefore, deprived of any constitutional right from that view point.

Rulings of State Courts.

The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to revise the decisions of the State courts upon questions of State law.

> Enterprise Irrigation Dist. v. Canal Co., 243 U. S. 157.
> McCaughey v. Lyall, 224 U. S. 558.
> Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.
> Dora Herbert v. State of La. (Oct. Term 1926).

In Hurtado v. People of California, 110 U. S. 516, 29 L. Ed. 232, the question at issue was the validity of the Constitution of California authorizing prosecutions for felonies by information, after examination and commitment by a magistrate without indictment by a grand jury in the discretion of the Legislature.

Mr. Justice Miller in delivering the Opinion of the Court said:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

In Brown v. New Jersey, 175 U. S. 171, 44 L. Ed. 119, the Counsel said:

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. * * * The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its modes of judicial proceeding. 'Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989, 992.' * * *

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

It is urged that such provision prevents a due process of law, in that it gives the prosecuting attorney, the officer of the state charged with the prosecution of the action, an interest in the amount recovered. We do not think this objection tenable. It has been the long established system in this state for the prosecuting attorneys to secure a fee taxed against and recovered from the defendant in criminal prosecutions, and his fee depends upon the success of the prosecution. He is likewise allowed a commission for the collection of forfeited cognizance. There can be no difference as regards the effect upon the officer whether he receives a fee to be taxed against and recovered from the defendant which depends upon the successful prosecution of the action and allowing him a certain ten per cent—or a certain portion of the amount recovered as a compensation for

> his services. As to whether it is good policy to do either or not is a matter with the Legislature. They have the right, as we think, to do either."

If the laws of the State are within the scope of the State Constitution the operation of such laws, even though of an oppressive character, are not in violation of the due process of law guarantee.

In Missouri Pac. R. Co. v. Humes (115 U. S. 520) the court said:

> "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

A case very similar to the instant case and illustrating how far the courts will go before holding that a situation is not comprehended within due process of law is Herbert v. Baltimore County Commissioners, 55 Atlantic, 376, 97 Md. 639. The court there had under consideration an act which provided that justices of the peace should not receive for their services any more than ten dollars in any one month in criminal cases. The claim was made that this act violated the Fourteenth Amendment. On page 377 the court says:

> "We have been unable to understand in what manner our legislation violates this Amendment. *By this legislation, no person is deprived of life, liberty or property without due process of law,* nor is any one denied the equal protection of the

> law, unless it be true, as contended by the plaintiff, that he is deprived of just compensation, and the citizen placed in serious jeopardy of being torn from his family charged with crime and brought before a tribunal, which tribunal will receive no remuneration for its services by conviction of the traverser however innocent."

That sounds very much like the claim made in the instant case. On page 378 the court further says:

> "But it is said the citizen may, by the operation of this law be denied justice and deprived of his liberty because by its operation the justice, in order to increase his compensation, may be induced to convict when in justice he should acquit. We can not recognize the force of this suggestion, furnishing, as it is upon the assumption that justices will violate their oath and duties of their office, and not upon anything that the law authorizes to be done. Such conduct, resulting, it is said, in a denial of justice and a deprivation of liberty of citizen, would be such a gross violation of every moral as well as legal duty that it is not necessary to say it is not authorized by the legislation complained of, and therefore, affords no ground for declaring it invalid. Ulman v. Mayor, 72 Md., 596, 20 Atlantic, 141, 21 Atlantic, 709, 11 L. R. A., 224."

Another case having some points in common with the instant case is In re Geurrero, 69 Cal., 88. The charge in this case was carrying on the business of a place where intoxicating liquors are sold without procuring a license. The mayor and council were granted power by the city charter to license the carrying on of trades, callings or other business. The charter made a violation of any ordinance authorized by the act a misdemeanor. The mayor presided over the council

that passed the ordinance. The mayor also acted as the court in trying the accused. On page 100 the court says:

> "The fact that the same person officiated as mayor, and as mayor presided in the local legislative body which passed the ordinance, did not divest him of his authority under the charter to act as the judicial officer of the court. The provisions of the charter which made the mayor of the city a component part of the council and 'ex officio city judge' are not in conflict with the constitution." See Uridias v. Morrell, 22 Cal., 474.

On page 101 the court further says:

> "His (the mayor's) qualification to act was challenged by an affidavit, made and filed by the defendant, which contained a statement of defendant's belief that he could not have a fair and impartial trial in the city court on account of the prejudice and bias of the judge who as judge of the court and mayor of the city, was the subject of much acrimonious discussion by the newspapers and persons within the municipality, in connection with the passage of the ordinance and in consequence thereof 'the said mayor and judge is interested in the result of the trial and is interested in convicting affiant.' It is also urged that if Section 12, Article 5 of the charter provides that 'all fines collected in said city court shall be paid by the said judge into the city treasury and be placed to the credit of the salary fund', and as Subdivision 1, Section 2, Article 11 of the charter provides that the mayor of the city shall receive a monthly salary of $150, the mayor, as ex officio city judge, was interested in convicting the petitioner of violating the ordinance. It is difficult to see how this provision of the charter made the judge of the court, personally or pecuniarily interested

> in a criminal action for violating an ordinance so as to incapacitate him from trying it and from enforcing conviction by the collection of a municipal fine or imprisonment. Nor does the fact stated in the affidavit 'that the action of the mayor in approving the ordinance has been largely assailed in the city by individuals and by the papers', disqualify the mayor as ex officio city judge from exercising his judicial function in proceedings before him within his jurisdiction; nor was it sufficient as a basis for an application to change the place of trial in the proceeding and there was no excess of jurisdiction in denying the application made upon the affidavit for that purpose."

Another case in point is W. Bennett v. The State, 4 Texas Court of Appeals. Bennett was indicted and convicted for keeping a bank for gaming purposes. The assignment of error was that the county judge was disqualified from trying the cause for the reason that his fees were dependent upon conviction. The Constitution provided that "no judge should sit in any cause wherein he may be interested." The Constitution also provided that a county judge should receive as compensation for his service such fees and perquisites as may be prescribed by law. The syllabus of this case is as follows:

> "Though the Constitution provides that 'no judge shall sit in any cause wherein he may be interested,' the fact that a county judge's compensation in a misdemeanor case is a fee to be paid by the defendant, if convicted, does not disqualify the judge from trying such a case. The Constitution itself provides that the compensation of county judges shall be 'such fees and perquisites as may be prescribed by law.' "

Note also the following from Commonwealth v. Reenan, 97 Mass., 589:

> "A trial justice who is at the same time clerk of courts for the county, is not disqualified to pass judgment on a criminal complaint because he may receive compensation in legal fees for official services which it may become his duty to perform, as such clerk, in relation to the case, if it be removed to the superior court by appeal from his decision."

This holding was made notwithstanding there were seven other justices in that particular county.

Involving the question of interest is Wellamaker v. Terrell, 3 Ga. Appeals, 791, the syllabus of which is as follows:

> "The judge of the City Court of Barnesville is not disqualified from presiding or from entering judgment upon a *scire facias* to forfeit a recognizance although he is ex officio clerk of said court and individually pecuniarily interested in the costs in that case, and perhaps in the collection of other costs which may be due him in other cases, even though the collectibility of such latter costs may be to some extent dependent upon a judgment forfeiting the recognizance."

The above holding was made notwithstanding the fact that the Civil Code provides "no judge or justice of any court, no ordinary justice of the peace nor presiding officer or any inferior judicature or commission, can sit in any cause or proceeding in which he is pecuniarily interested" * * *. In this same case, according to the syllabus, the court held as follows:

> "Costs are fees allowed officers of courts for their services in a judicial proceeding. Though

incident to a suit, they are independent of the the issue. There is no liability upon a party for *costs until judgment fixing that liability*; and *pecuniary interest in costs the amount of which is fixed by law is not synonymous with pecuniary interest in a case.*"

Due process of law does not prevent legislatures from establishing different courts in different states or in the same state or in fixing their jurisdiction. In the case of Bowman v. Lewis, 101 U. S., page 989, the court said:

"* * * The equality clause in the 1st Section of the Fourteenth Amendment, viz.: that which prohibits any state from denying to any person the equal protection of the laws, contemplates the protection of persons, against unjust discriminations by a State; it has no reference to territorial or municipal arrangements made for different portions of a State. * * *

"It was not intended to prevent a state from arranging and parceling out the jurisdiction of its several courts as it sees fit, either as to territorial limits, subject-matter or amount, or the finality of their several judgments or decrees.

"Each state has full power to make political subdivisions of its territory, for municipal purposes, and to regulate their local government, including the constitution of courts, and the extent of their jurisdiction."

Justice Bradley in delivering the Opinion of the Court said with reference to the Fourteenth Amendment:

"* * * It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons

> within the places or municipalities for which such regulations are made. The Amendment could never have been intended to prevent a State for arranging and parceling out the jurisdiction of its several courts." * * *

Every provision of the State laws was complied with in the trial of this case. (The State Supreme Court sustained both the constitutionality of the law involved in the trial of the case and the judgment of the court in its conclusion. The procedure for reviewing the case, both on the evidence and the law, is most liberal in the State Statutes. Due process of law was provided and Plaintiff in Error exhausted every legal right he had available under its guarantees.

SUMMARY.

1. Plaintiff: in error was convicted in a court that has had jurisdiction in similar cases in Ohio for over sixty years.

2. He does not deny his guilt.

3. He does not claim in this instant case that he has been denied due process of law, so far as his guilt is concerned, but that the system of laws is so arranged that it may deny due process. This would not afford him relief if his contentions were true.

4. After conviction he was insured further due process of law by reviewing his case on the evidence in two courts and on the law in three state courts.

5. He is not denied due process because in case of commitment for non-payment of fine, he can work out the fine at so much per day or may be paroled.

6. The size of the fine in this case is not excessive nor does it show prejudice or financial interest in the court. Tumey was given the smallest fine possible.

7. If mayors are guaranteed their costs without regard to the outcome of the case, this would not reduce the chances of unwarranted arrests. It might result in more arrests and if mayors were inclined to be corrupt they would get their costs from the state or county and connive with the law-breaker in giving him an acquittal.

8. The plaintiff in error should address his arguments to the state legislature and not to the courts, as such questions are peculiarly within the jurisdiction of the legislative branch of the government.

For the above reasons we respectfully submit that the judgment of the court below should be sustained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 527.—October Term, 1926.

Ed Tumey, Plaintiff in Error,
vs.
The State of Ohio, Defendant in Error.
} In Error to the Supreme Court of Ohio.

[March 7, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The question in this case is whether certain statutes of Ohio in providing for the trial by the mayor of a village of one accused of violating the Prohibition Act of the State deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interest which those statutes give the mayor in the result of the trial.

Tumey, the plaintiff in error, hereafter to be called the defendant, was arrested and brought before Mayor Pugh of the Village of North College Hill charged with unlawfully possessing intoxicating liquor. He moved for his dismissal because of the disqualification of the Mayor to try him under the Fourteenth Amendment. The Mayor denied the motion, proceeded to the trial, convicted the defendant of unlawfully possessing intoxicating liquor within Hamilton County as charged, fined him $100, and ordered that he be imprisoned until the fine and costs were paid. He obtained a bill of exceptions and carried the case on error to the Court of Common Pleas of Hamilton County. That court heard the case and reversed the judgment, on the ground that the Mayor was disqualified as claimed. 25 Ohio Nisi Prius (N. S.) 580. The State sought review by the Court of Appeals of the first appellate district of Ohio, which reversed the Common Pleas and affirmed the judgment of the Mayor. 23 Ohio Law Reporter, 634.

On May 4, 1926, the State Supreme Court refused defendant's application to require the Court of Appeals to certify its record in the case. The defendant then filed a petition in error in that court as of right, asking that the judgment of the Mayor's Court and of the Appellate Court be reversed on constitutional grounds. On May 11, 1926, the Supreme Court adjudged that the petition

be dismissed for the reason that no debatable constitutional question was involved in the cause. The judgment was then brought here upon a writ of error allowed by the Chief Justice of the State Supreme Court, to which it was rightly directed. *Matthews* v. *Huwe, Treasurer,* 269 U. S. 262; *Hetrick* v. *Village of Lindsey,* 265 U. S. 384. This brings us to the merits of the case.

The defendant was arrested and charged with the unlawful possession of intoxicating liquor at White Oak, another village in Hamilton County, Ohio, on a warrant issued by the Mayor of North College Hill. The Mayor acted under the sections of the State Prohibition Act and Ordinance No. 125 of the Village of North College Hill adopted in pursuance thereof.

Section 6212-15 (Ohio General Code) provides that "No person shall after the passage of this act manufacture . . . possess . . . any intoxicating liquors . . ."

Section 6212-17 provides that ". . . any person who violates the provisions of this act (General Code, Sections 6212-13 to 6212-20) for a first offense shall be fined not less than one hundred dollars nor more than one thousand dollars; for a second offense he shall be fined not less than three hundred dollars nor more than two thousand dollars; for a third and each subsequent offense he shall be fined not less than five hundred dollars nor more than two thousand dollars and be imprisoned in the state penitentiary not less than one year nor more than five years. . . ."

The Mayor has authority, which he exercised in this case, to order that the person sentenced to pay a fine shall remain in prison until the fine and costs are paid. At the time of this sentence, the prisoner received a credit of sixty cents a day for each day's imprisonment. By a recent amendment, that credit has been increased to one dollar and a half a day. Sections 13716, 13717, Ohio Gen. Code.

Section 6212-18 provides, in part, that "Any justice of the peace, mayor, municipal or police judge, probate or common pleas judge within the county with whom the affidavit is filed charging a violation of any of the provisions of this act (G. C. Sections 6212-13 to 6212-20) when the offense is alleged to have been committed in the county in which such mayor, justice of the peace, or judge may be sitting, shall have final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part of the penalty, but error may be prosecuted to the judgment of such mayor, justice of the peace, or judge as herein provided."

Error from the Mayor's Court lies to the court of Common Pleas of the County and a bill of exceptions is necessary to pre-

ent questions arising on the evidence. Sections 10359, 10361, Ohio General Code. The appellate review in respect to evidence s such that the judgment can only be set aside by the reviewing court on the ground that it is so clearly unsupported by the weight of the evidence as to indicate some misapprehension or mistake or bias on the part of the trial court or a wilful disregard of duties. *Datesh* v. *State*, 23 Ohio Nisi Prius (N. S.) 273.

Section 6212-19, provides that "Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, one-half to the treasury of the township, municipality or county where the prosecution is held, according as to whether the officer hearing the case is a township, municipal, or county officer."

Section 6212-37 provides that "The council of any city or village may by ordinance, authorize the use of any part of the fines collected for the violation of any law prohibiting the manufacture and sale of intoxicating liquors, for the purpose of hiring attorneys, detectives, or secret service officers to secure the enforcement of such prohibition law. And such council are hereby authorized to appropriate not more than five hundred dollars annually from the general revenue funds, for the purpose of enforcing the law prohibiting the manufacture and sale of intoxicating liquors, when there are no funds available from the fines collected for the violation of such prohibitory law."

Under the authority of the last section, the Village Council of North College Hill passed Ordinance No. 125, as follows:

"An ordinance to provide for compensation to be paid from the secret service funds of the Village of North College Hill, Hamilton County, Ohio, created by authority of Section 6212-37, of the General Code of Ohio, to detectives, secret service officers, deputy marshals' and attorneys' fees, costs, etc., for services in securing evidence necessary to conviction and prosecuting violation of the law of the state of Ohio prohibiting the liquor traffic.

"Be it ordained by the Council of the Village of North College Hill, Hamilton County, Ohio:

"Section I. That fifty per cent of all moneys hereafter paid into the treasury of said village of North College Hill, Ohio, that is one-half of the share of all fines collected and paid into and belonging to said village of North College Hill, Ohio, received from fines collected under any law of the state of Ohio, prohibiting the liquor traffic, shall constitute a separate fund to be called the Secret Service Fund to be used for the purpose of securing the enforcement of any prohibition law.

"Section II. That deputy marshals of the village of North College Hill, Ohio, shall receive as compensation for their services in securing the evidence necessary to secure the conviction of per-

sons violating the law of the state of Ohio, prohibiting the liquor traffic, an amount of money equal to 15 per cent of the fine collected, and other fees allowed by law.

"Section III. That the attorney at law of record prosecuting persons charged with violating the law of the state of Ohio, prohibiting the liquor traffic, shall receive as compensation for legal services an amount equal to 10 per cent of the fine collected, in all cases, whether the plea be guilty or not guilty.

"Section IV. That detectives and secret service officers shall receive as compensation for their services in securing the evidence necessary to secure the conviction of persons violating the law of the state of Ohio, prohibiting the liquor traffic, an amount of money equal to 15 per cent of the fine collected.

"Section V. That the mayor of the village of North College Hill, Ohio, shall receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases.

"Section VI. This ordinance is hereby declared to be an emergency ordinance, necessary to the immediate preservation of the public peace and safety, made necessary by reason of the flagrant violation of the laws of Ohio, enacted to prohibit traffic in intoxicating liquors, and shall be in effect from and after this passage."

The duties of the Mayor of a village in Ohio are primarily executive. Section 4248 of the General Code of Ohio provides as follows:

"Section 4248. The executive power and authority of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law.

"Section 4255. . . . He (the Mayor) shall be the chief conservator of the peace within the corporation. . . . He shall be the president of the council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.

"Section 4258. . . . He shall see that all ordinances, by-laws and resolutions are faithfully obeyed and enforced. . . .

"Section 4259. The mayor shall communicate to council from time to time a statement of the finances of the municipality, and such other information relating thereto and to the general condition of affairs of the municipality as he deems proper or as may be required by council.

"Section 4262. The mayor shall supervise the conduct of all the officers of the corporation. . . ."

The fees which the mayor and marshal received in this case came to them by virtue of the general statutes of the state applying to all state cases, liquor and otherwise. The Mayor was entitled to hold the legal fees taxed in his favor. Ohio General

ode, Sec. 4270, *State* v. *Nolte,* 111 O. S. 486. Moreover, the orth College Hill village council sought to remove all doubt on is point by providing (sec. 5, Ord. 125, *supra*), that he should eceive or retain the amount of his costs in each case, in addition his regular salary, as compensation for hearing such cases. But o fees or costs in such cases are paid him except by the defend-nt if convicted. There is, therefore, no way by which the Mayor ay be paid for his service as judge, if he does not convict those ho are brought before him; nor is there any fund from which arshals, inspectors and detectives can be paid for their services arresting and bringing to trial and furnishing the evidence to nvict in such cases, except it be from the initial $500 which e village may vote from its treasury to set the court going or om a fund created by the fines thereafter collected from con-icted defendants.

By an Act of 1913 (103 O. L. 290), the Mayor's court in llages in Hamilton County and in half a dozen other counties with rge cities, was deprived of jurisdiction to hear and punish mis-emeanors committed in the county beyond the limits of the cor-oration. The Prohibition Act, known as the Crabbe Act, adopted 1920 (108 O. L.—Pt. 1, 388 and Pt. 2, 1182) changed this and ave to the mayor of every village in the State jurisdiction within e county in which it was situate to try violations of that Act.

Counsel for the State in their brief explain the vesting by state leg-latures of this country of jurisdiction in village courts as follows: The purpose of extending the jurisdiction in the first instance as to break up places of outlawry that were located on the unicipal boundary just outside of the city. The Legislature also ced the situation that in some of the cities the law enforcement gencies were failing to perform their duty, and, therefore, in order at those forces that believe in enforcement and upholding of law ight have some courts through which process could be had, it gave mayors county-wide jurisdiction.'' It was further pointed out argument that the system by which the fines to be collected were be divided between the State and the village was for the proper rpose of stimulating the activities of the village officers to such e enforcement.

The Village of North College Hill in Hamilton County, Ohio, shown by the Federal census to have a population of 1104. That Hamilton County, including the City of Cincinnati, is more an half a million. The evidence discloses that Mayor Pugh

came to office after ordinance No. 125 was adopted, and that there was a division of public sentiment in the village as to whether the ordinance should continue in effect. A petition opposing it and signed by a majority of the voters was presented to Mayor Pugh. To this the Mayor answered with the declaration that if the village was in need of finances, he was in favor of and would carry on "the Liquor Court," as it was popularly called, but that if the court was not needed for village financial reasons, he would not do so. It appears that substantial sums were expended out of the village treasury from the fund made up of the fines thus collected for village improvements and repairs. The Mayor was the owner of a house in the village.

Between May 11, 1923 and December 31, 1923, the total amount of fines for violation of the prohibition law collected by this village court was upwards of $20,000, from which the State received $8,992.50, North College Hill received $4,471.25 for its general uses; $2,697.25 was placed to the credit of the village safety fund, and the balance was put in the secret service fund. Out of this, the person acting as prosecutor in the liquor court received in that period $1,796,50; the deputy marshals, inspectors and other employees, including the detectives, received $2,697.75, and $438.50 was paid for costs in transporting prisoners, serving writs and other services in connection with the trial of these cases. Mayor Pugh received $696.35 from these liquor cases during that period as his fees and costs, in addition to his regular salary.

That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. *Dimes* v. *Grand Junction Canal,* 3 H. L. C. 759; *Gregory* v. *Railroad,* 4 O. S. 675; *Peace* v. *Atwood,* 13 Mass. 324; *Taylor* v. *Commissioners,* 105 Mass. 225; *Kentish Artillery* v. *Gardiner,* 15 R. I. 296; *Moses* v. *Julian,* 45 N. H. 52; *State* v. *Crane,* 36 N. J. L. 394; *Railroad Company* v. *Howard,* 20 Mich. 18; *Stockwell* v. *Township,* 22 Mich. 341; *Findley* v. *Smith,* 42 W. Va. 299; Nettleton's Appeal, 28 Conn. 268; Cooley's Constitutional Limitation, 7th ed., p. 592, *et seq.* Nice questions, however, often arise as to what the degree or nature of the interest must be. One is in respect to the effect of the membership of a judge in a class of taxpayers or others to be affected by a principle of law, statutory or constitutional, to be applied in a case between other parties and in which the judge has no other interest. Then the circumstance that there is no judge not equally disqualified to act in such a case

has been held to affect the question. *Wheeling* v. *Black*, 25 W. Va. 266, 280; *Peck* v. *Freeholders of Essex*, 20 N. J. L. 457; *Dimes* v. *Grand Junction Canal*, 3 H. L. C. 759 (see Baron Parke's Answer for the Judges, pp. 785, 787); Year Book, 8 Henry 6, 19, s. c. 2 Roll. Abridg. 93; *Evans* v. *Gore*, 253 U. S. 245, 247; *Stuart* v. *Mechanics' & Farmers' Bank*, 19 Johns. 496; *Ranger* v. *Railroad*, 5 H. L. C. 72. We are not embarrassed by such considerations here for there were available in this case other judicial officers who had no disqualification either by reason of the character of their compensation or their relation to the village government.

All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. *Wheeling* v. *Black*, 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

The Mayor of the Village of North College Hill, Ohio, had a direct personal pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional but was the result of the normal operation of the law and the ordinance. Counsel for the State do not deny this, but assert the validity of the practice as an exception to the general rule. They rely upon the cases of *Ownbey* v. *Morgan*, 256 U. S. 94; *Murray's Lessee* v. *Hoboken Land and Improvement Company*, 18 How. 272, 276-280. These cases show that in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. Counsel contend that in Ohio and in other States, in the economy which it is found necessary to maintain in the administration of justice in the inferior courts by justices of the peace and by judicial officers of like jurisdiction, the only compensation which the State and county and township can afford is

the fees and costs earned by them, and that such compensation is so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty, or as prejudicing the defendant in securing justice, even though the magistrate will receive nothing if the defendant is not convicted.

We have been referred to no cases at common law in England prior to the separation of colonies from the mother country showing a practice that inferior judicial officers were dependent upon the conviction of the defendant for receiving their compensation. Indeed in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable. *Bonham's Case,* 8 Coke, 118 a. Same case, 2 Brownlow and Goldesborough's Reports, 255; *City of London* v. *Wood,* 12 Modern Reports 669, 687; *Day* v. *Savage,* Hobart 85, 87; *Hesketh* v. *Braddock,* 3 Burrows 1847, 1856, 1857 and 1858.

As early as the 12th Richard II, A. D. 1388, it was provided that there should be a commission of the justices of the peace, with six justices in the county once a quarter, which might sit for three days, and that the justices should receive four shillings a day "as wages," to be paid by the sheriffs out of a fund made up of fines and amercements, and that that fund should be added to out of the fines and emercements from the courts of the Lords of the Franchises which were hundred courts allowed by the King by grant to individuals.

It was required that the justices of the peace should be knights, esquires or gentlemen of the land, qualifications that were not modified until 1906. The wages paid were used "to defray their common diet," and they soon became obsolete. Holdsworth's History of English Law, 288, 289. The wages paid were not dependent on conviction of the defendant. They were paid at a time when the distinction between torts and criminal cases was not clear. Holdsworth, Vol. 2, 363, 365; Vol. 3, 328; and they came from a fund which was created by fines and amercements collected from both sides in the controversy. There was always a plaintiff, whether in the action for a tort or the prosecution for an offense. In the latter he was called the prosecutor. If he failed to prove his case, whether civil or criminal, he was subject to amercement *pro falso clamore,* while if he succeeded, the defendant was *in misericordia.* See *Commonwealth* v. *Johnson,* 5 S. & R. Pennsyl-

vania, 195, 198; *Musser* v. *Good,* 11 S. & R. Pennsylvania, 247. Thus in the outcome someone would be amerced in every case, and the amercements generally went to the Crown, and the fund was considerable. The statute of Richard II remained on the statute book until 1855 when it was repealed by the 18th and 19th Victoria. Meantime the hundred courts by franchise had largely disappeared. The wages referred to were not part of the costs. The costs at common law were the amounts paid either by the plaintiff or prosecutor or by the defendant for the witnesses or services of the court officers. Burn's Justice, Vol. 1, p. 628. Chitty's Criminal Law, 4 ed. 1841, Vol. 1, 829. See also 14 George III, ch. 20, 1774. For hundreds of years the justices of the peace of England seem not to have received compensation for court work. Instead of that they were required, upon entering upon the office, to pay certain fees. Holdsworth, Vol. 1, p. 289; 19 Halsbury's Laws of England, sec. 1152. Local judges in towns are paid salaries.

There was at the common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justices of the peace. In Hawkins, 2nd Pleas of the Crown, we find the following:

"The general rule of law certainly is that justices of the peace ought not to execute their office in their own case; (citing 1 Salk. 396) and even in cases where such proceeding seems indispensably necessary, as in being publicly assaulted or personally abused, or their authority otherwise contemned while in the execution of their duty, yet if another justice be present, his assistance should be required to punish the offender (Stra. 240).

"And by the common law, if an order of removal were made by two justices, and one of them was an inhabitant of the parish from which the pauper was removed, such order was illegal and bad, on the ground that the justice who was an inhabitant was interested, as being liable to the poor's rate. (Rex *v.* Great Chart, Burr. S. C. 194, Stra. 1173.)" And this strict principle, unless there is relief by the statute, is seen in modern cases. *Queen* v. *The Recorder of Cambridge,* 8 Ellis & Blackburn, 637; *Regina* v. *Hammond,* 9 Law Times Reports (N. S.) 423; *The Queen* v. *Rand,* Law Reports, 1st Queen's Bench, 230; *Queen* v. *Gaisford,* 1st Queen's Bench Division, 381; 19 Halsbury's Laws of England 1156.

There was then no usage at common law by which justices of the peace or inferior judicial officers were paid fees on condition that

they convicted the defendants, and such a practice certainly can n
find support as due process of law in English precedent. It ma
be that the principle as stated in Blackstone, Book 3rd, page 40
that the King shall neither pay nor receive costs, because it
the King's prerogative not to pay them to a subject and is b
neath his dignity to receive them, was misunderstood and led,
suggested by Mr. Lewis in his edition of Blackstone (see Lewis
Blackstone, Note No. 60—Vol. III, 400) to the practice in son
States in minor cases of allowing inferior judges no compens
tion except by fees collected of the convicted defendant, b
whether it did or not, the principle relied on did not suppo
the practice. That practice has prevailed and still prevails
Arkansas, Kentucky, Nebraska, North Carolina, Georgia, Ohio ar
Texas, and it seems at one time to have obtained in Indiana, Orego
Illinois and Alabama.

In two of these States only has the question been considered b
their courts, and it has been held that provision for payment
the judge of fees only in case of conviction does not disqualify hi
Those are *Bennett* v. *State*, 4 Texas Appeals, 72; *Tellmaker*
Terrell, 3 Ga. App. 791. There is no discussion in either of th
question of due process of law. The existence of a statute autho
izing the practice seems to have been the controlling consideratio
Two other cases are cited. In *Ex parte Guerrero*, 69 Cal. 88, th
judge was paid a regular salary fixed by law. The fund out
which this was paid was increased by fees and fines collected in h
court, but there is no evidence that payment of his salary w
dependent on the amount of his collections or convictions.
Herbert v. *Baltimore County*, 97 Md. 639, the action was by
justice of the peace against a county for services in criminal case
A new law limited him to $10 a month. The statement of the ca
does not distinctly show that in convictions he would have had
larger compensation from his costs collected out of the defendan
but this may be assumed from the argument. His contention w
that the new law was invalid because it did not give the defendan
before him due process. The court held against him, chiefly
the ground that he must be satisfied with the compensation th
law afforded him. Responding to his argument that the new la
was invalid because justices would be induced to convict when
justice they should acquit, the court said:

"We can not recognize the force of this suggestion, founded
it is upon the assumption that the justices will violate their oath

and the duties of their office and not upon anything that the law authorizes to be done."

So far as the case goes, it is an authority for the contention of the State, but the issue thus raised was not considered at length and was not one which in such an action the court would be patient to hear pressed by the justice whose constitutional rights were not affected. *Tyler* v. *Court,* 179 U. S. 405, 409; *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U. S. 306, 318.

In the case of *Probasco* v. *Raine, Auditor,* 50 O. S. 378, the question arose whether the fee of 4 per cent. payable to county auditors for placing omitted property on the duplicate list for taxation, which required investigation and quasi-judicial consideration, was invalid. The court held that it was not, and that the objection urged there could not be based on the argument that a man could not be a judge in his own case, that the auditor had no case to be adjudged, but that on the contrary he was the taxing officer before whom other parties were cited to appear and show cause why they should not bear their equal burden of taxation. The court said that the action of the auditor was not final so as to cut off further inquiry, but that the whole case might be gone into anew by proper proceedings in court. An exactly opposite conclusion was reached by the United States Circuit Court for the Northern District of Ohio in *Meyers* v. *Shields,* 61 Fed. 713, 725 *et seq.*

In other States than those above mentioned the minor courts are paid for their services by the State or county regardless of acquittal or conviction, except that in Virginia the minor courts receive one-half of the usual fees where there is acquittal. Four States have put into their constitutions a provision that the State must pay the costs in such cases in case of acquittal. They are California, Florida, Louisiana and South Carolina.

The strict common law rule was adopted in this country as one to be enforced where nothing but the common law controlled, and citizens and taxpayers have been held incompetent to sit in suits against the municipal corporation of which they have been residents. *Diveny* v. *Elmira,* 51 N. Y. 506; *Corwein* v. *Hames,* 11 Johns. 76; *Clark* v. *Lamb,* 2 Allen 396; *Dively* v. *Cedar Falls,* 21 Iowa 565; *Fulweiler* v. *St. Louis,* 61 Mo. 479; *Petition of New Boston,* 49 N. H. 328; *Commonwealth* v. *McLane,* 4 Gray 427; *Fine* v. *St. Louis Public Schools,* 30 Mo. 166, 173. With other courts, however, and with the legislatures, the strict rule seemed to be

inconvenient, impracticable and unnecessary, and the view was taken that such remote or minute interest in the litigation might be declared by the Legislature not to be a reason for disqualification of a judge or juror.

A case, much cited, in which this conclusion was reached and in which the old English corporation cases were considered was that of *City Council* v. *Pepper,* 1 Richardson (S. C.) 364. The recorder of the City of Charleston sentenced a non-resident of the city for violation of a city ordinance requiring him to take out a license for what he did or to pay a fine not exceeding $20. The contention was that the defendant was a non-corporator and non-resident and not subject to the jurisdiction of the city court; that the recorder was a corporator and interested in the penalty and therefore was not competent to try the cause. The Court said (p. 366) in respect to *Hesketh* v. *Braddock,* 3 Burrows 1847, *supra:*

"It will be remarked that that case depends altogether upon the common law, and if the city court depended upon the same for its jurisdiction, the objection might be fatal. But the establishment and jurisdiction of the city court commences with the Act of 1801. By that Act it is clothed with the power of trying all offences against the by-laws of the city, and for that purpose is given concurrent jurisdiction with the court of Sessions. This grant of power is from all the people of the State, through their Legislature, and surely they have the power to dispense with the common law objection, that the corporators were interested, and ought not to be intrusted with the enforcement of their laws against others. The authority given to the city court to try all offenders against the city ordinances, impliedly declares, that notwithstanding the common law objection, it was right and proper to give it the power to enforce the city laws against all offenders. That there was great reason in this can not be doubted, when it is remembered that the interest of the corporators is so minute as not to be even thought of, by sheriff, juror or judge. It is very much like the interest which similar officers would feel in enforcing a State law, the sanction of which was a penalty. The sum thus to be recovered goes in exoneration of some part of the burden of government to which every citizen is subjected; but such an interest has no effect upon the mind. It is too slight to excite prejudice against a defendant. The same thing is the case here. For the judge, sheriff and jurors, are members of a corporation of many thousand members. What interest, of value, have they in a fine of twenty dollars? It would put a most eminent calculator to great trouble to ascertain the very minute grain of interest which each of these gentlemen might have. To remove so shadowy and slight an objection, the Legislature thought proper to clothe the city court, consisting of its judge, clerk, sheriff and jurors, with authority to try the defendant, and he can not now object to it."

the same view is taken in *Commonwealth* v. *Ryan*, 5 Mass. *ommonwealth* v. *Reed*, 1 Gray, 472, 475; *Thomas* v. *Mt.* *a*, 9 Ohio 290; *Commissioners* v. *Lytle*, 3 Ohio 289; *Wheel-* *Black*, 25 W. Va. 266, 280; *Board of Justices* v. *Fennimore*, L. 190; *Foreman* v. *Mariana*, 43 Ark. 324; *Cartersville* v. 59 Ga. 577; *Omaha* v. *Olmstead*, 5 Neb. 446; *Hill* v. *Wells*, ering 104; *Commonwealth* v. *Emery*, 11 Cushing 406; *Bar-* *State*, 4 Tex. App. 72; *Wellmaker* v. *Terrell*, 3 Ga. App. *tate* v. *Craig*, 80 Maine 85.

Justice Cooley in his work on Constitutional Limitations, tion, page 594, points out that the real ground of the ruling e cases is that "interest is so remote, trifling and insignificant may fairly be supposed to be incapable of affecting the judg- or of influencing the conduct of an individual. And where es are imposed, to be recovered only in a municipal court, ge or jurors in which would be interested as corporators in overy, the law providing for such recovery must be regarded luding the objection of interest." But the learned judge oceeds:

except in cases resting upon such reasons, we do not see legislature can have any power to abolish a maxim which g the fundamentals of judicial authority."

ring then to a remark in the case of the *Matter of Leefe*, Ch. 39, that the people of the State when framing their tion might possibly establish so great an anomaly, if they the learned author says:

n this must be deemed doubtful since the adoption of the th article of the amendments to the Federal Constitution, enies to the state the right to deprive one of life, liberty or , without due process of law."

this review we conclude that a system by which an inferior s paid for his service only when he convicts the de- has not become so embedded by custom in the general either at common law or in this country that it can be re- s due process of law unless the costs usually imposed are that they may be properly ignored as within the maxim *is non curat lex.*

layor received for his fees and costs in the present case from such costs under the Prohibition Act for seven e made about $100 a month, in addition to his salary. We egard the prospect of receipt or loss of such an emolument

in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant brought before the Mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the Mayor should weigh against his acquittal.

These are not cases in which the penalties and the costs are negligible. The field of jurisdiction is not that of a small community engaged in enforcing its own local regulations. The court is a state agency imposing substantial punishment, and the cases to be considered are gathered from the whole county by the energy of the village marshals and detectives regularly employed by the village for the purpose. It is not to be treated as a mere village tribunal for village peccadilloes. There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.

But the pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here. The statutes were drawn to stimulate small municipalities in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between the State and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without opportunity for retrial and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence, unless it should appear to be so manifestly against the evidence as to indicate mistake, bias or willful disregard of duty by the trial court. It specifically authorizes the village to employ detectives, deputy marshals and other assistants to detect crime of this kind all over the county, and to bring offenders before the Mayor's court, and it offers to the

village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecunarily successful conduct of such a court. The mayor represents the village and can not escape his representative capacity. On the other hand, he is given the judicial duty first of determining whether the defendant is guilty at all, and second having found his guilt to measure his punishment between $100 as a minimum and $1,000 as a maximum for first offenses, and $300 as a minimum and $2,000 as a maximum for second offenses. With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases cited above in the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. *City of Boston* v. *Baldwin*, 139 Mass. 315; *Florida ex rel. Colcord* v. *Young*, 31 Fla. 594. It is, of course, so common to vest the mayor of villages with inferior judicial functions that the mere union of the executive power and the judicial power in him can not be said to violate due process of law. The minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact. The difference between such a case and the plan and operation of the statutes before us is so plain as not to call for further elaboration.

Counsel for the State argue that it has been decided by this Court that the legislature of a state may provide such system of courts as it chooses, that there is nothing in the Fourteenth Amendment that requires a jury trial for any offender, that it may give

such territorial jurisdiction to its courts as it sees fit, and therefore that there is nothing sinister or constitutionally invalid in giving to a village mayor the jurisdiction of a justice of the peace to try misdemeanors committed anywhere in the county, even though the Mayor presides over a village of 1,100 people and exercises jurisdiction over offenses committed in a county of 500,000. This is true and is established by the decisions of this Court in *Missouri* v. *Lewis,* 101 U. S. 22, 30; *In re Claasen,* 140 U. S. 200. See also *Carey* v. *State,* 70 Ohio State 121. It is also correctly pointed out that it is completely within the power of the legislature to dispose of the fines collected in criminal cases as it will, and it may therefore divide the fines as it does here, one-half to the State and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the legislature of a State may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people. The legislature may offer rewards or a percentage of the recovery to informers. *United States* v. *Murphy & Morgan,* 16 Pet. 203. It may authorize the employment of detectives. But these principles do not at all affect the question whether the State by the operation of the statutes we have considered has not vested the judicial power in one who by reason of his interest, both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant.

It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge which existed both because of his direct pecuniary interest in the outcome and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification.

The judgment of the Supreme Court of Ohio must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.